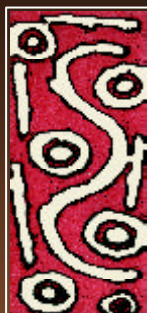
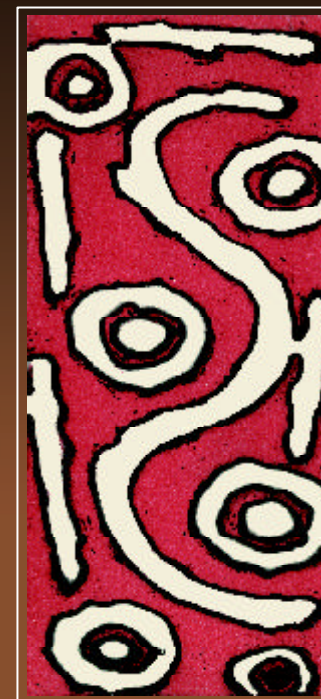




Social Justice Report



Paddy Japaljarri Sims, *Yarripiri* (Snake).

'We think about that Dreaming for the kids. They might see that dreaming, they might settle down.

'It might be his grandfather's, granny's, big brother's or uncle's country. That's why we thought about putting those stories.

'We had to think, our dreaming now, to put from warringiyi (father's father) and jamirdi (mother's father).'

Aboriginal & Torres Strait Islander Social Justice Commissioner Social Justice Report 2001

Report No. 2/2002
Australia Post
Print Post Approval
PP255003/04753

2001

Human Rights and Equal Opportunity Commission 



Aboriginal & Torres Strait Islander
Social Justice Commissioner

Aboriginal & Torres Strait Islander Social Justice Commissioner

The position of Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Human Rights and Equal Opportunity Commission in 1993 to carry out the following functions:

- (1) Report annually on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed.
- (2) Promote awareness and discussion of human rights in relation to Aboriginal peoples and Torres Strait Islanders.
- (3) Undertake research and educational programs for the purposes of promoting respect for, and enjoyment and exercise of, human rights by Aboriginal peoples and Torres Strait Islanders.
- (4) Examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders.

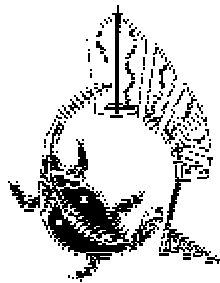
The Commissioner is also required, under Section 209 of the *Native Title Act 1993*, to report annually on the operation of the *Native Title Act* and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

For information on the work of the Social Justice Commissioner please visit the HREOC website at: http://www.hreoc.gov.au/social_justice/index.html

The Social Justice Commissioner can be contacted at the following address:

Aboriginal and Torres Strait Islander Social Justice Commissioner
Level 8, Piccadilly Tower, 133 Castlereagh Street
GPO Box 5218
Sydney NSW 1042

Telephone: (02) 9284 9600
Facsimile: (02) 9284 9611
Website: <http://www.humanrights.gov.au>



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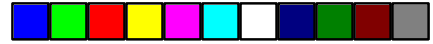
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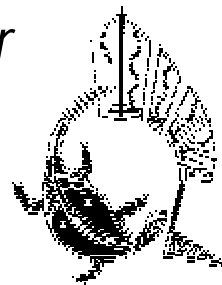




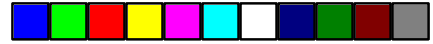
Social Justice Report

2001

*Aboriginal & Torres Strait Islander
Social Justice Commissioner*



*Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner
to the Attorney-General as required by section 46C(1)(a) Human Rights & Equal Opportunity Commission Act 1986.*



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ISSN 1321-11

Cover Design and Desktop Publishing by Jodey Wills
Printed by Superfine Printing

The Aboriginal and Torres Strait Islander Social Justice Commissioner acknowledges the work of Human Rights and Equal Opportunity Commission staff (Darren Dick, Joe Hedger, Cyndia Henty-Roberts, Eleanor Hogan, Susan Newell and Frith Way) in producing this report.

Artist Acknowledgement

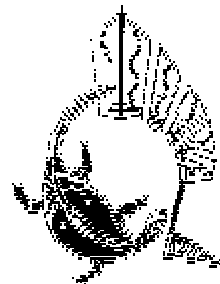
The artwork reproduced on the cover is an etching by Paddy Japaljarri Sims, a member of Warlukurlangu Artists at Yuendumu, Northern Territory. It is one of a series of Yuendumu door etchings by Paddy Japaljarri Stewart and Paddy Japaljarri Sims which won the 18th Telstra Indigenous Art Awards Works on Paper section. The etchings are based on designs painted on 30 school doors at Yuendumu by five artists, including Paddy Japaljarri Stewart, Paddy Japaljarri Sims and Roy Jupurrurla Curtis (other artists are deceased) in 1983. Twenty-seven Dreamings were represented on the Doors, referring to more than two hundred sites in Warlpiri and Anmatjerre territory.

During the early 1980s many of these places were only just becoming accessible to Warlpiri again through the land rights process. In this way, the Doors represented more than affirmation of the artists' links with country; they indicated the readiness of the artists to assume the political and social responsibilities for those places. The painted Doors were also intended to remind the Yuendumu schoolchildren of a web of sites and obligations extending across their country. The Doors remained at Yuendumu, resisting erasure for 12 years despite the desert wind and sun, and robust treatment from Warlpiri school children.

We thank Warlukurlangu Artists Aboriginal Association for granting permission to reproduce the painting. Copyright is retained by the Paddy Japaljarri Sims and Warlukurlangu Artists Aboriginal Association. The quotation on the back cover is from Paddy Japaljarri Stewart, March 2001.

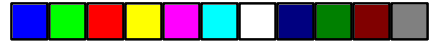
About the Social Justice Commission logo

The right section of the design is a contemporary view of a traditional Dari or head-dress, a symbol of the Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.



The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Social Justice Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

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Human Rights and Equal Opportunity Commission



23 December 2001

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I am pleased to present to you the *Social Justice Report 2001*.

The report is provided in accordance with section 46C of the *Human Rights and Equal Opportunity Commission Act 1986*, which provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the exercise and enjoyment of human rights by those persons.

This year's report contains twelve recommendations, which are reproduced at the beginning of the report as well as in the relevant chapters.

Yours sincerely,

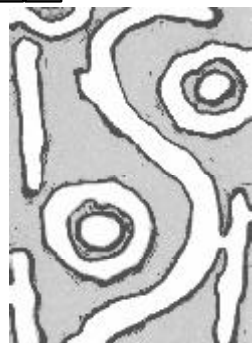
Dr William Jonas AM
Aboriginal and Torres Strait Islander
Social Justice Commissioner



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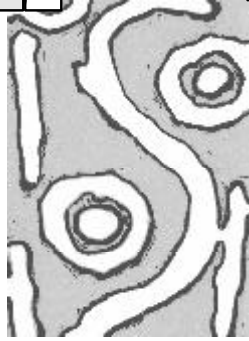
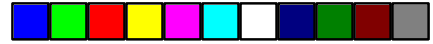
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Recommendations

In submitting this report I am required to make any recommendations as to actions that should be taken by governments to improve the recognition of the human rights of Indigenous people.¹ This year's report contains 12 recommendations, which are reproduced here and discussed further in the relevant chapters.

Juvenile diversionary schemes in the Northern Territory

Recommendation 1: A Juvenile Justice Division be established and adequately resourced within the NT Department of Justice. Prime responsibility for coordinating pre-court and post-court diversion, especially family and victim-offender conferences and referral to programs, be transferred from NT Police and NT Corrections to specialist Youth Case Workers in the Juvenile Justice Division. NT Police retain a Juvenile Diversion Division to implement the continued significant police involvement in diversionary processes.

Recommendation 2: As an urgent priority, a review be undertaken by the Department of Justice to establish program needs across the Territory, particularly as they relate to regional areas and Indigenous people. The terms of the review should include examining methods for coordinating youth service delivery in justice, health and welfare related areas across government departments, including through the NT Police proposal for community youth development units, and the potential for Aboriginal customary law to be recognised through diversionary processes. The review should be conducted on the basis of widespread consultation, particularly with Indigenous organisations.

Recommendation 3: The NT Law Reform Commission be empowered through legislation to conduct an independent review of the operation of pre-court and post-court diversionary schemes every four years. The review be required to consider compliance with human rights standards and to be conducted on the basis of widespread consultation with Indigenous organisations, communities and young offenders.



Recommendation 4: The *Juvenile Justice Act 1993* (NT) and *Police Administration Act 1978* (NT) be amended to provide legislative detail on juvenile diversionary processes. The amendments should require the police to inform the young person that they are entitled to access to a legal advocate or a registered local community advocate (for example, in remote areas) at any stage of the process and to facilitate contact immediately if so required; and should require an admission of guilt prior to a diversionary option, other than a verbal warning, being offered. The amendments should also provide for review of decisions regarding diversion, and independent monitoring and evaluation provisions (as outlined above). In relation to Indigenous young people, the legislation should specify that they are entitled to an interpreter as well an interview friend (in accordance with the Anungu rules).

Recommendation 5: A children's legal service be established and appropriately resourced, including through the provision of a 24 hour phone hotline for children's legal advice.

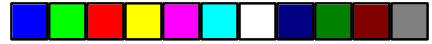
Recommendation 6: It be made an offence to publish material identifying a defendant or a young person who has participated in a diversionary option under the age of 18 years.

Juvenile diversionary schemes in Western Australia

Recommendation 7: The *Young Offenders Act 1994* (WA) be amended to include greater detail on the operation of diversionary options in WA, rather than matters integral to the process being contained in Police General Orders. The amendments should include the following as a minimum:

- create a presumption that police will divert young people unless a range of specified criteria are not met;
- provide for review of decisions regarding diversion;
- require that a young person is informed that they are entitled to access to a legal advocate at any stage of the process;
- require that an interpreter be freely available at all stages in the process where there is doubt about the ability of the young person to understand the proceedings or express themselves in English; and
- provide that previous cautions and justice team referrals cannot be cited in court as though they form part of a prior record.

Recommendation 8: The Department of Justice consult Regional Councils of the Aboriginal and Torres Strait Islander Commission and Aboriginal community organisations about the adequacy of current community based diversionary programs for Indigenous juvenile offenders, particularly in regional areas, and their form, organisation, management and coordination in the future.



Recommendation 9: Juvenile Justice Teams and conferencing processes be adequately funded in regional areas. Funding be provided for the employment of Aboriginal workers, and the training of Aboriginal people in local communities to act as conference facilitators.

3



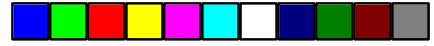
Recommendation 10: The Department of Justice coordinate the development of consistent record keeping on diversionary processes across all agencies, particularly the Department of Justice, Police and Children's Court. Record keeping must identify the ethnicity of offenders in order to identify the extent of any racial bias in referral processes. This data should be subject to ongoing and independent monitoring and evaluation.

Reconciliation

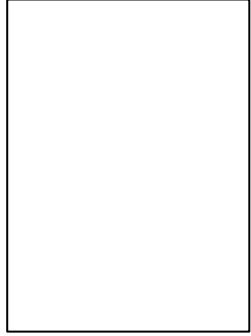
Recommendation 11: The Senate empower the Legal and Constitutional References Committee to conduct an inquiry into the implementation and response to the reconciliation process. The terms of reference of the inquiry should require the Committee to examine the recommendations contained within the *Roadmap to Reconciliation*, the final report of the Council for Aboriginal Reconciliation and the *Social Justice Report 2000* as well as the adequacy of the response of the Federal Government to each of these. In determining the adequacy of the response, the Committee should be required to consider processes by which government agencies have reviewed their policies and programs against the documents of reconciliation; as well as the adequacy of targets and benchmarks adopted and monitoring and evaluation mechanisms.

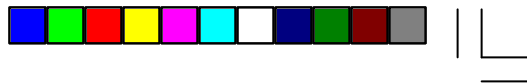
Recommendation 12: At the time of tabling of the annual Social Justice Report in Parliament, or within 15 sitting days, the Government furnish a response to the report and its recommendations in Parliament. In the event that the Government does not furnish such a response in Parliament, the Senate consider the establishment of a parliamentary inquiry to consider matters that appear in or arise out of the report and its recommendations, and matters to which the Committee believes Parliament's attention should be directed.





Introduction







Chapter 1

7

Ten years on from the Royal Commission into Aboriginal Deaths in Custody

The year 2001 marked the tenth anniversary of the final report of the Royal Commission into Aboriginal Deaths in Custody. The 5 volumes and 339 recommendations that comprise the national report of Commissioner Johnston remain among the most extensive, frank and devastating examinations of the impact of colonialism on the Indigenous peoples of this country.

But while it is in people's nature to celebrate anniversaries, it must be said that this anniversary is a sad one. There is less to celebrate some ten and a half years after the Royal Commission's findings than we might have hoped for.

The reports of the Royal Commission provided the impetus for the reconciliation process and identified the necessity for the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families. They marked a turning point in the recognition of the wrongs of the past, and did so unreservedly.

They also provided great optimism that serious attention would be devoted to overcoming the systemic, structural discrimination that Indigenous people face in Australian society as a result of colonialism.

But while some genuine efforts to this end have been made in the decade since the Royal Commission and continue to be made today, the sense of urgency and commitment to addressing Indigenous over-representation in criminal justice processes has slowly dissipated.

Indigenous people have continued to die in custody at high rates in the decade since the Royal Commission, and the average rate of Indigenous people in corrections has steadily increased on a national basis since the Royal Commission. Yet in 2001 this hardly raises a murmur of discontent yet alone outrage among the broader community. These facts either go unnoticed, or perhaps even worse in the age of reconciliation, are simply accepted and not challenged.

As a consequence, Indigenous affairs seem to have become a series of anniversaries – operating as an annual reminder of the unfulfilled promises and commitments of governments.



While this year is the tenth anniversary of the Royal Commission, next year will be the tenth anniversary of the rejection of the *Mabo* decision which rejected *terra nullius* and recognised the continued existence of native title. It is also the fifth anniversary of the *Bringing them home* report. Again we will have anniversaries of events where the fundamental recognition and acknowledgement of wrongs committed in the past have not been matched by adequate remedy and redress by government.

It is also close to a year and a half since the release of the *Australian Declaration towards Reconciliation* and the *Roadmap to Reconciliation*, and a year since the final report and recommendations to government by the Council for Aboriginal Reconciliation. These documents were the result of a ten year process partly instigated by the Royal Commission, the National Report of which identified reconciliation as 'an essential commitment on all sides if change is to be genuine and long term'.¹

I ask myself of this, is it adequate that at the end of a sustained ten year process of reconciliation the government has failed to provide a national response and detailed plan of action for implementation of the recommendations of the Council for Aboriginal Reconciliation and has instead dismissed them as of symbolic rather than practical application?

The symbolism of this approach is crystal clear – it shows a demonstrable lack of respect for the distinctive cultures of Indigenous people and a lack of commitment to seeking a just accommodation of our distinct identities within the Australian societal fabric.

I offer these introductory comments in order to paint a picture of the broader context in which we must evaluate our progress as a nation ten years on from the Royal Commission. For ultimately, the Royal Commission was about exposing a system of public institutions that have utterly failed Aboriginal people, and about making a series of proposals to guide governments in how to 'right' the wrongs through greater respect for Indigenous cultures and on the basis of effective participation and self-determination.

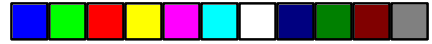
The Royal Commission into Aboriginal Deaths in Custody

The Royal Commission into Aboriginal Deaths in Custody was established to investigate the deaths of 99 Indigenous people in the custody of police, prison or juvenile detention centres between 1 January 1980 and 31 May 1989. The circumstances of each person whose death was examined by the Royal Commission differed vastly, yet the Commission found that in each case 'facts associated... with their Aboriginality played a significant and in most cases dominant role in their being in and dying in custody'.²

While there was no evidence of an overall pattern of abuse, neglect or racism common to all the deaths, the Royal Commission concluded that the reasons for Indigenous deaths in custody were unambiguous:

1 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 1*, AGPS Canberra 1991, pxlviii.

2 *ibid*, p1.



Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. However, what is overwhelmingly different is the rate at which Aboriginal people come into custody, compared with the rate of the general community.³

Put simply, Aboriginal people died in custody in disproportionate numbers because they were in custody in disproportionate numbers. The Royal Commission offered forthright condemnation of this fact: 'Too many Aboriginal people are in custody too often... (It) is totally unacceptable and... would not be tolerated if it occurred in the non-Aboriginal community'.⁴

The recommendations of the report focused on the necessity to reduce Indigenous over-representation at every stage of the criminal justice system. The Royal Commission saw that this task lay at two levels – first, 'and in some ways the most immediate and in many ways the least difficult, is at the level of the criminal justice system itself'.⁵ The report examined the processes of the criminal justice system from the initial point of contact with the police through to the point of sentencing, as well as the practices of coroners following a person's death.

Key factors identified by the Royal Commission in this regard were the often petty nature of much contact with the police and the way that this contact escalated into more serious offending and contact – with particular concern expressed at the 'crucial importance which detention for public drunkenness occupies in Aboriginal custodial over-representation',⁶ as well as other forms of public order regulation. The key principle which underpinned the recommendations of the Commission in this regard was that imprisonment should be a measure of last resort, with the use of alternatives to custody and diversionary mechanisms where appropriate.

A focus on the criminal justice system alone, however, was not going to change the overall life circumstances which drew Indigenous people into the criminal justice system's web:

the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which bring Aboriginal people into conflict with the criminal justice system in the first place... the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in society – socially, economically and culturally.⁷

Central to the approach of the report was the contention that the current circumstances of Indigenous people in this country are a direct consequence of the history of colonisation – a history which was well known to historians and Indigenous people, but which was not well enough known among non-Indigenous society. 'From that history many things flow which are of central importance to the issue of Aboriginal over-representation in custody'.⁸

3 *ibid*, p6.

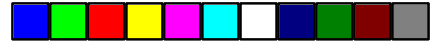
4 *ibid*.

5 *ibid*, p12.

6 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 3*, AGPS Canberra 1991, p3.

7 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 1*, *op.cit*, p15.

8 *ibid*, p8.



In particular, the Royal Commission noted that this history was one of:

deliberate and systematic disempowerment of Aboriginal people starting with dispossession of their land and proceeding to almost every aspect of their life... (with) every turn in the policy of government and the practice of the non-Aboriginal community... postulated on the inferiority of Aboriginal people... Every step of the way is based upon an assumption of superiority and every new step is an entrenchment of that assumption.⁹

The Commission acknowledged that this was often 'guided by the best of motives' but that it was also always done 'in the sure knowledge that (Aboriginal) people needed our superior ideas and skills... Aboriginal peoples were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control'.¹⁰

This inequality manifested itself greatest at the point of contact between Indigenous and non-Indigenous societies – namely, through policing and the criminal justice system – which one criminologist has appropriately described as 'an efficient mechanism for the State to manage race conflicts and cross-cultural inequalities within society'.¹¹

Addressing Indigenous over-representation in the criminal justice system in a lasting manner therefore required fundamental change to the existing relationship between the mainstream society and Indigenous communities. It required that the control over Indigenous people's lives be removed from the public institutions of the mainstream society, particularly those formalised through the police and criminal justice system, and that the unequal basis of the relationship be remedied by addressing the profound economic, social and cultural disadvantage experienced by Indigenous peoples. Ultimately, it required an end to the domination of Aboriginal people, and the re-empowerment and return of control of Aboriginal lives and communities to Aboriginal hands.

The Royal Commission did not underestimate the difficulties of this task. It identified a number of essential prerequisites which must exist in order for Indigenous people to be in a position to freely determine their own destinies. First, it required 'the desire and capacity of Aboriginal people to put an end to their disadvantaged situation and to take control of their lives'.¹² This aspiration the Commission was confident existed, despite the evident social dysfunction in many Indigenous communities. Second, it required assistance and understanding from the broader community, with bi-partisan political support for funding to redress historically derived Indigenous disadvantage while at the same time allowing Indigenous societies to be self-determining.¹³

What was required was a process of reconciliation to end the unequal position that Indigenous people occupy in Australian society and to embrace our diversity and cultural distinctiveness. The final recommendation of the Royal Commission called for political leadership for such a process – with bi-partisan support and

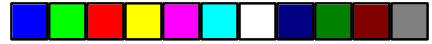
9 *ibid*, pp9-10.

10 *ibid*, p10.

11 Broadhurst, R 'Crime, justice and Indigenous peoples: the 'new justice' and settler states' (1999) 32(2) *Australian and New Zealand Journal of Criminology*105, p105.

12 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 1, op.cit*, p16.

13 *ibid*, p22.



acknowledgement of its urgency and necessity. In doing so, the Report integrally linked the outcomes of the reconciliation process to the need to address the underlying causes of Indigenous over-representation in criminal justice processes.

Ten years on from the Royal Commission – how far have we progressed?

The Royal Commission laid a solid foundation for governments to address the over-representation of Indigenous people in custody and in custodial deaths. It clearly identified the challenges facing government and provided 339 steps to assist in meeting those challenges.

There have clearly been advances in the decade since the Royal Commission, but they have not been enough and they have been accompanied by major policy regressions in other areas.

Among the advances has been the establishment of Aboriginal Justice Councils across the country. These provide independent scrutiny of government action in relation to criminal justice processes, and greater input into justice policy formulation. There have been vast improvements in coronial and statistical collection systems. There have also been many other initiatives such as the development of the National Indigenous Legal Studies Curriculum to support Aboriginal field officers in legal services as well as the provision of support mechanisms in custody for Indigenous detainees. There have been the development of Indigenous community justice initiatives such as night patrols and mechanisms which recognise customary law and which provide for the input of communities and elders into criminal justice processes, for example, the Aboriginal court in South Australia to the recently introduced circle sentencing trial in New South Wales and Community Justice Groups in Queensland.

At a broader level, the Royal Commission has made a significant contribution to the collective understanding of the history of Australia. As I said in the *Social Justice Report 2000*, the past ten years:

have seen Indigenous issues become indelibly etched on the national consciousness. The wider community has become aware of a history that was previously only considered orthodox by Indigenous communities. A series of events, particularly the reports of the Royal Commission into Aboriginal Deaths in Custody, the recognition of native title and the documenting of the impact of policies of the forcible removal of Indigenous children from their families, have exposed the foundational myths of our nation's history...¹⁴ These key events have ensured that at the end of the first decade of the formal process of reconciliation, we find ourselves unable to take the easy road and ignore or forget the past... In many respects, this has been the great advance of the past decade.¹⁵

Clearly, we cannot move forward as a cohesive, inclusive nation without a frank acknowledgement of the history of relations with Indigenous Australians and its impact on the contemporary circumstances of Indigenous communities. This is a highly significant legacy of the Royal Commission.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission, Sydney 2000, p6.

15 *ibid*, p8.



But it is one thing to acknowledge the truth of our history, and another one entirely to deal with its consequences.

There are four main indicators which demonstrate that, despite these advances, governments have not progressed adequately beyond the situation that existed at the time of the Royal Commission and have failed to achieve the lasting change necessary to ensure that Indigenous people can participate in Australian society without discrimination and on the basis of true equality. These are:

- The increased rate of over-representation of Indigenous people in criminal justice processes and the continued high number of deaths in custody since the release of the Royal Commission's recommendations;
- The poor implementation of the recommendations of the Royal Commission; and
- The lack of adequate progress in addressing the underlying issues which lead to contact with the criminal justice system.

Rates of Indigenous over-representation and deaths in custody

The most tangible indicator of progress since the Royal Commission is the extent of Indigenous contact with the criminal justice system. Has the rate of over-representation of Indigenous people and the number of deaths in custody been reduced? We could have reasonably expected that lasting improvements for both of these measures would have been realised within a timeframe of ten years.

This has not happened. Indigenous people continue to be grossly over-represented in criminal justice processes, and the level of over-representation has in fact worsened – rather than improved - since the Royal Commission.

Figure 1 below shows the imprisonment rate¹⁶ of Indigenous and non-Indigenous persons over the age of 16 and the ratio of Indigenous over-representation for the period 1991 to 1999.

The line graphs shows how the number of Indigenous prisoners has increased at an average rate of 8% per year since 1991, compared with an increase in the non-Indigenous prisoner population of 3% per year on average. This has meant that the number of Indigenous prisoners in 1999 made up 20% of the total prisoner population in 1999 compared to 14% in 1991. That a group that constitutes just over 2% of the total population provides 20% of the country's prisoners is shocking.

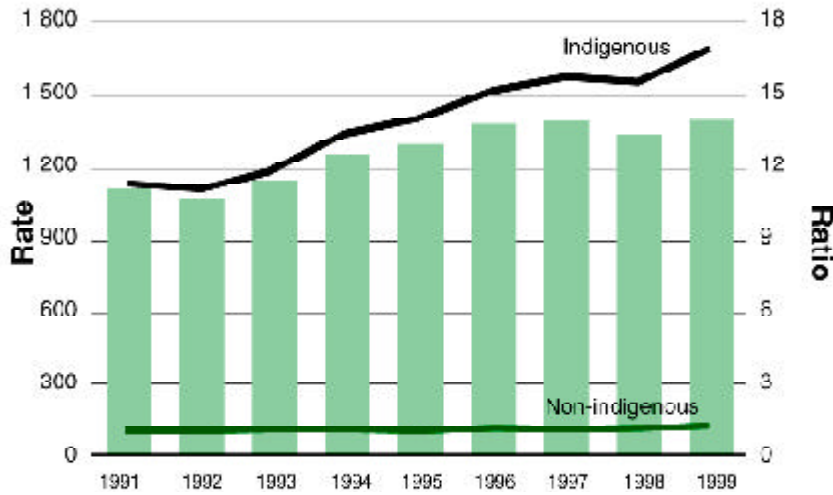
The bar graph shows how the ratio of imprisonment of Indigenous prisoners compared to non-Indigenous prisoners has increased steadily from 1991 to 1999, to a national average almost 14 times the rate of non-Indigenous prisoners in 1999. Statistics for 2000 and 2001 have worsened – with the Indigenous rate of imprisonment now 14.9 times the non-Indigenous rate on a national basis for the June 2001 Quarter.¹⁷

¹⁶ These data include both sentenced prisoners and remandees.

¹⁷ Australian Bureau of Statistics, *Corrective services Australia – June Quarter 2001*, ABS Canberra 2001, Table 5, p20.



Figure 1 – Indigenous and non-Indigenous prisoners, 1991-99



Source: Australian Institute of Criminology¹⁸

On a state by state basis, the situation was worst in Western Australia and South Australia where Indigenous people were incarcerated at 20.6 and 17 times the rate of non-Indigenous people respectively at 30 June 2001. Even the state with the best record, Tasmania, has nothing to be proud of – Indigenous people are over-represented in custody at 5.2 times the non-Indigenous rate.¹⁹

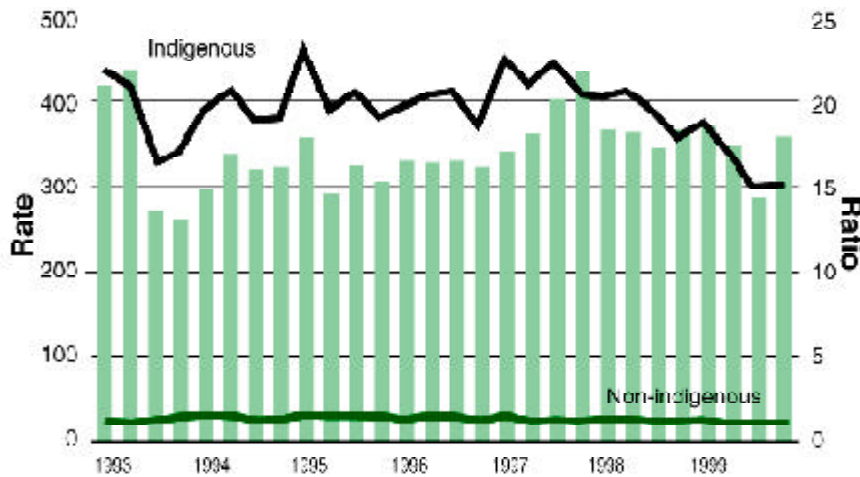
The rates for Indigenous juveniles are no better. The rates of juvenile detention have fallen significantly in the twenty years from 1981 to 2000, by nearly half for males and nearly two thirds for females. Despite this, Indigenous juveniles remain grossly over-represented in juvenile corrections and the rate of over-representation has increased.

Figure 2 shows the incarceration rate of Indigenous and non-Indigenous juveniles (aged 10-17 years) and the ratio of imprisonment rates from 1993 to 1999.

18 Australian Institute of Criminology, *Australian crime – Facts and figures 2000*, AIC Canberra 2001, Figure 52.

19 *ibid.*

Figure 2 – Persons in juvenile corrective institutions by Indigenous status, 1993-99



Source: Australian Institute of Criminology²⁰

The bar graph shows the consistently high rate of over-representation of Indigenous juveniles in corrective institutions. In 2000, Indigenous juveniles were in juvenile corrections at a rate 15.5 times more than the non-Indigenous rate, compared to 13 times in 1993.²¹ Since 1997, Indigenous juveniles in corrections have consistently made up approximately 42% of the total juvenile detention population.²²

Perhaps most worrying of all, however, is the rise in imprisonment of Indigenous women in the decade since the Royal Commission. The total number of Indigenous female prisoners on a national basis increased by 262% between 1991 and 1999. This compares to a rise of 185% in the total female prisoner population.²³

The rate of imprisonment for Indigenous women has also nearly doubled between 1991 and 1999 from 104 to 207 per 100,000 population.²⁴ There are three comparisons that indicate the gravity of this situation:

²⁰ Australian Institute of Criminology, *Australian crime – facts and figures 2000, op.cit.*, Figure 59. See also Australian Institute of Criminology, *Persons in juvenile corrective institutions 1981-2000*, AIC Canberra 2001, Table 3 and Figure 2.

²¹ Australian Institute of Criminology, *Persons in juvenile corrective institutions 1981-2000*, AIC Canberra 2001, Table 3 and Figure 2. This over-representation rate reached as high as 17 times the non-Indigenous rate in 1997: Australian Institute of Criminology, *Australian crime – facts and figures 2000, op.cit.*, Figure 59.

²² Australian Institute of Criminology, *Australian crime – facts and figures 2000, op.cit.*, Figure 59.

²³ Australian Institute of Criminology, *Women in prison – Numbers soar*, Media Release, 1 October 2000. See Also: Margaret Cameron, *Women prisoners and correctional programs*, Trends and issues in crime and criminal justice – Number 194, Australian Institute of Criminology, Canberra 2001, pp1-2. It must be noted, however, that the female prisoner population is extremely small and constitutes approximately 6% of the total prison population.

²⁴ *ibid.*



- The rate of women incarcerated per 100,000 for the total female population in 1999 was 15.3 women compared to 207 for Indigenous females.²⁵ At the end of the June 2001 quarter, Indigenous women were incarcerated at a rate 21 times that of non-Indigenous women. In Western Australia the incarceration rate was 29.7 times the non-Indigenous rate, while it was 26.3 times the non-Indigenous rate in New South Wales.²⁶ The result of this is that Aboriginal women in New South Wales, for example, consistently constitute between 25-31% of the female prison population at any given time despite comprising approximately 2% of the state's total female population.²⁷
- This rate of over-representation for Indigenous women (compared to total women) is significantly higher than the rate for Indigenous men (compared to total men), despite the national average rate of over-representation of Indigenous males being unacceptably high at 14.9 times the non-Indigenous male rate for the June 2001 quarter.²⁸
- The rate of imprisonment of 207 Indigenous females per 100,000 is comparable to the rate of imprisonment for non-Indigenous males. This is despite imprisonment generally being a male phenomenon, with males comprising approximately 94% of the total prison population.²⁹

These figures are profoundly distressing.

Despite this, Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs. This is of critical importance, particularly because of the impact that imprisonment has on Indigenous families and communities (especially through separation from children).

As noted earlier, the Royal Commission found that Indigenous people did not die at a greater rate than non-Indigenous people in custody but in proportion to their size of the custodial population. Given the above figures on incarceration and the increasing rates of over-representation over the past 10 years, it follows that Indigenous deaths in custody are likely to have continued during the past decade at a substantial rate and one similar to that in the decade leading up to the Royal Commission.

A total of 115 Indigenous people died in custody in the period from 1990 to 1999, compared to 110 people in the period from 1980 to 1989.³⁰ This constituted a slight fall in the average annual rate of Indigenous deaths in custody from 4.4

25 *ibid.*

26 Australian Bureau of Statistics, *Corrective services Australia – June Quarter 2001*, *op.cit.*, Table 5, p21.

27 Select Committee on the increase in the prison population, *Interim report: Issues relating to women*, NSW Parliament, Sydney 2000, para 3.12.

28 Australian Bureau of Statistics, *Corrective services Australia – June Quarter 2001*, *op.cit.*, Table 5, p21.

29 Australian Institute of Criminology, *Women in prison – Numbers soar*, *op.cit.*, p1.

30 Williams, P, *Deaths in custody: 10 years on from the Royal Commission*, Trends and Issues in Criminal Justice –Number 203, Australian Institute of Criminology, Canberra 2001, p2.



persons per 100,000 to 3.8.³¹ Over the ten years from 1990 to 2000, 18% of all people who died in custody were Indigenous.³²

There were some significant changes related to the deaths in custody in the decade since the Royal Commission. In the decade prior to the Royal Commission 61% of Indigenous deaths occurred in police custody. This was reduced to 18% in the decade since. Correspondingly, the occurrence of Indigenous deaths in prison rose from 39% in the decade prior to the Royal Commission to 78% in the decade since.³³

The reduction of the number of deaths in police custody may reflect the implementation of the relevant recommendations of the Royal Commission, such as changes to circumstances in which Indigenous prisoners are held in police custody and cell conditions. It also reflects the transfer of the site of deaths to prison custody. The Australian Institute of Criminology has noted that the number of Indigenous deaths in prison custody has doubled in the decade since the Royal Commission, as did the Indigenous prison population.³⁴ This appears to confirm the validity of the finding of the Royal Commission that Indigenous people die in custody in rates proportionate to which they are held in custody.

Ten years on we should not be facing a situation where rates of over-representation have worsened like this and deaths in custody have not been significantly reduced. The lack of concern and urgency from governments to rectify this is distressing. As the Royal Commission stated, this situation would not be tolerated if it occurred in the non-Indigenous community.

This point is illustrated by research in Victoria which considered the rates of over-representation of Indigenous people between 1993 and 1997. After stating the rate at which alleged Indigenous male offenders are processed by the police in Victoria, the researchers noted that this rate 'potentially ranks them statistically amongst the most arrested groups of people anywhere', and that if this rate applied 'to the non-Indigenous male community, then in the year 1996/97 alone arrests of non-Aborigines would number in the vicinity of **half a million!**'³⁵

This is but one illustration of the magnitude of the crisis that currently exists across this country.

Implementation of the Royal Commission recommendations

The second indicator of governmental progress in the past decade is the level of implementation of the recommendations of the Royal Commission.

31 *ibid*, p5.

32 Collins, L and Mouzos, J, *Australian deaths in custody and custody-related police operations 2000*, Trends and Issues in Criminal Justice –Number 217, Australian Institute of Criminology, Canberra 2001, p2.

33 Williams, P, *Deaths in custody: 10 years on from the Royal Commission*, *op.cit*, p2.

34 *ibid*, p6.

35 Gardiner, G, *Indigenous people and the criminal justice system in Victoria: Alleged offenders, rates of arrest and over-representation in the 1990s*, Criminal Justice Monograph 2001, Centre for Australian Indigenous Studies, Monash University 2001, p27. Emphasis in original. It is notable that rates of over-representation of Indigenous males in Victoria are significantly lower than many other states, where this situation would potentially be far worse.



The Royal Commission was an extensive inquiry process that resulted in 99 reports on each of the individuals who died in custody, as well as regional reports and the five volume national report. This process ended upon submission of the final national report in 1991.

The responsibility for implementing the Commission's findings rested with governments and their service delivery agencies. The first recommendation of the Royal Commission made clear that governments should do this through a process agreed in partnership and after consultation with Indigenous organisations. The responsibility and accountability for monitoring and evaluating the implementation of the report's recommendations also lay with governments at the federal, state and territory levels.

\$400 million was allocated by the Commonwealth government for the implementation of the Royal Commission's recommendations. Each jurisdiction produced an annual implementation report for a period of 6 years. Towards the end of this process there was also a national Ministerial Summit to examine the status of the implementation of the recommendations. There were a number of independent reviews of implementation during this timeframe, by ATSIIC and HREOC, criminologists and a Federal parliamentary committee.

This implementation process, while superficially appearing extensive, has been spectacularly unsuccessful. The reporting process was fundamentally flawed for a number of reasons.³⁶ First, it did not result in accurate evaluations of progress at any level due to the lack of independence and evaluation in each annual government report.

The NSW Aboriginal Justice Advisory Council (AJAC) has argued, for example, that of the 299 recommendations that apply to the NSW government a minimum of 140 of them have not been implemented in any meaningful way, with a range of other recommendations also not fully implemented.³⁷ This is despite a claim to the contrary by the NSW government in their 1998 implementation report.

An example of this is the NSW government response to recommendation 62 of the Royal Commission which calls on governments to recognise that the problems affecting Indigenous juveniles are so widespread and have such potentially disastrous repercussions, and accordingly to devise strategies designed to reduce the rate of separation of juveniles from their families, be it through care and protection or the juvenile justice system. The government has cited the *Young Offenders Act 1997* as proof of its implementation of the recommendation, and it is certainly a positive development. But they have failed to mention those laws and practices which militate against the objective of the recommendation by creating a situation of greater contact with criminal justice processes, particularly through repressive public space and public order regulation. I discuss the particular impact of public order regulation in greater detail shortly.

36 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous deaths in custody 1989-1996*, Aboriginal and Torres Strait Islander Commission, Canberra 1996, p257.

37 Aboriginal Justice Advisory Council (NSW), *Royal Commission into Aboriginal Deaths in Custody: Review of NSW government implementation of recommendations*, AJAC NSW, Sydney, 2000, p8.



Second, governments generally took what my predecessor called the 'public relations approach' to the reporting process, re-packaging existing programs as an implementation response at the end of each year. The NSW AJAC nominates this as the principal problem with implementation of the Royal Commission's recommendations, because of the 'decentralised and retrospective nature' of the government reporting process:

responding to a recommendation at the end of a reporting period has meant that agencies have responded with activity that most closely matches recommendations rather than pro-actively examining how to implement the specific requirements of a recommendation.³⁸

This makes a critical examination of the response meaningless and does not allow long term planning.

This approach has also meant that the implementation process has been piecemeal and ad hoc. There have not been whole-of-government responses to all the recommendations, integrating programs across departments and between levels of government to ensure coordinated outcomes. The focus of the reporting process has also not been on an assessment of pre-agreed, negotiated outcomes which measure real achievements. It has been simply responding to individual recommendations in isolation from the rest of the report.³⁹ Ultimately, it means that the 'implementation report' is nothing more than a piece of empty government rhetoric, and is treated by government as an end in itself.

As my predecessor, Commissioner Dodson, stated when examining the reality of government claims of implementation in 1996:

Australian governments claim to have implemented the overwhelming bulk of Royal Commission recommendations. Implementation is not support for recommendations or the planning of policies distant from the site of death. Implementation is outcomes. This means changing legislation, changing priorities, changing cultures and changing procedures. While there are discernable improvements, [there is] a large gap between the rhetoric of implementation reports and the circumstances of the deaths of 96 Aboriginal people [since the Royal Commission]⁴⁰ ...

Commissioner Dodson referred to a six stage plan for implementation of the Royal Commission recommendations by government departments:

- 1) Reviewing current activities;
- 2) Developing policies and programs;
- 3) Setting goals or targets;
- 4) Allocating responsibility for implementation;
- 5) Ensuring adequate communication and training supports the plans;
and
- 6) Establishing evaluation mechanisms.⁴¹

38 Aboriginal Justice Advisory Council (NSW), *Where to from here? 10 years after the Royal Commission, some suggested direction for Aboriginal justice planning*, AJAC (NSW), Sydney 2001, p9.

39 *ibid.*

40 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous deaths in custody 1989-1996*, *op.cit.*, p viii.

41 *ibid.*, p257.



The implementation process for the Royal Commission has rarely moved beyond this first stage.

Accompanying this flawed process of reporting over the last decade has been a nationwide trend towards tougher 'law and order' policies. Such 'tough on crime' approaches to criminal justice have ranged from zero tolerance in the Northern Territory to truth in sentencing in NSW, to crackdowns on activities in public spaces across the country with the introduction of alcohol dry zones (such as recently introduced in Adelaide) to laws which provide police with additional powers to move people along (the *Public Order and Anti-Social Conduct Act 2001*(NT)) or remove them to a safe house for their own safety (the *Children (Protection and Parental Responsibility) Act 1997* (NSW)), to provisions allowing police to remove people who are drunk into protective custody to the continued prosecution for summary offences such as offensive behaviour and language.

The impact of this approach has contradicted efforts to address Indigenous over-representation in custody. At the same time as 'promoting or reporting on activities which aim to reduce Aboriginal contact with the criminal justice system... major government initiatives, policy and legislation seem to increase that contact'.⁴² The most obvious and offensive example of this is the existence of mandatory sentencing regimes in the Northern Territory and Western Australia alongside government commitments to enforce the principle of imprisonment as a sanction of last resort (recommendation 92 of the Royal Commission).

Particularly worrying in this regard is the often unnoticed, incremental, yet growing impact of public order regulation on Indigenous people, operating as a de facto criminalisation of Indigenous people and being the entry point to more serious offending. Indeed, a plethora of public order laws and increased surveillance and regulation of public space in the past decade has operated as a control mechanism for dealing with what is essentially characterised, either deliberately or not, as 'the Indigenous problem'.

Some examples of new or amended laws since the Royal Commission include provisions in NSW which enable police to search people they suspect of carrying dangerous implements,⁴³ allow police to require people in public areas to supply their name and address when requested⁴⁴ and provide police with the power to 'move on' people where they believe that they are obstructing others or causing fear in others,⁴⁵ as well as the *Children (Protection and Parental Responsibility) Act 1997* (NSW); and the continued criminalisation of offensive language and offensive conduct in sections 4 and 4a of the *Summary Offences Act 1988* (NSW).

42 Aboriginal Justice Advisory Council (NSW), *Royal Commission into Aboriginal Deaths in Custody: Review of NSW government implementation of recommendations*, AJAC NSW, Sydney, 2000, p8.

43 The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW).

44 *Crimes Act 1900* (NSW).

45 *Summary Offences Act 1988* (NSW), s28.



These laws have undoubtedly disproportionately impacted on Indigenous people. For example, based on 1998 data, Aboriginal people were grossly over-represented for criminal proceedings for offensive language and offensive conduct, making up over 20% of all prosecutions despite being 1.8% of the NSW population. 14.3% of all Aboriginal people appearing in Local Court in NSW appeared on at least one charge of offensive conduct or language.⁴⁶ This means that they are 15 times more likely to be prosecuted for these charges than non-Indigenous people (a figure which quite incredulously rises to over 80 times the state average in Inverell and Richmond River).⁴⁷

In one out of every four cases in which an Indigenous person was charged with offensive language or conduct, they were also charged with offences against the police – either resist arrest or assault police.⁴⁸

The NSW Bureau of Crime Statistics and Research has also recently shown that the main categories of offences on which Indigenous people are convicted in New South Wales are good order offences (including offensive conduct), as well as offences against justice (such as breach of court order and resist arrest) and violent offences. In the case of good order and justice offences, there is a higher discretion in police as to whether to lay charges in the first place.⁴⁹

Similarly, a review of the operation of the *Children (Protection and Parental Responsibility) Act 1997* (NSW) in Moree and Ballina demonstrated a clearly disproportionate impact on Indigenous people being removed from the street.⁵⁰ Part 3 of the Act provides that in designated towns (council areas which are approved for the purposes of the Act), police have the power to remove unaccompanied young people under the age of 16 from a public place where they determine that the person is 'at risk'. In this context, 'at risk' means that they are in danger of physical harm or abuse, or about to commit an offence. The Act is an amended version of one introduced in 1994 which was widely condemned for breaching human rights and the recommendations of the Royal Commission.

In the first six months of operation of the Act in Moree, 95 young people were picked up by the police. In 91 of these occasions, the young person was Aboriginal. The review of the Act's operation found that:

the Act has impacted almost solely on Aboriginal young people to the extent that it may be grounds for a complaint of indirect racial discrimination to domestic and international bodies. Police are taking young people home during the day as well as in the evening, sometimes while these young people are involved in cultural activities. The Act has sanctioned widespread over-surveillance and control of young people.

46 Aboriginal Justice Advisory Council NSW, *Policing public order, offensive language and behaviour, the impact on Aboriginal people*, AJAC, Sydney 1999, p3.

47 *ibid*, p4.

48 Aboriginal Justice Advisory Council NSW, *Policing public order, offensive language and behaviour, the impact on Aboriginal people*, AJAC, Sydney 1999.

49 Baker, J, *The scope for reducing indigenous imprisonment rates*, NSW Bureau of Crime Statistics and Research – Crime and Justice Bulletin Number 55, Sydney 2001, p3.

50 Aboriginal Justice Advisory Council NSW, *A fraction more power – review of the impact of the Children (Protection and Parental Responsibility) Act on Aboriginal people in Moree and Ballina*, AJAC NSW 2000.



Young people have been incorrectly told there are curfews in place and areas of town are 'no-go zones'. The Act has significantly changed behaviour patterns of young people and limited their freedom to move around town.⁵¹

It is immaterial whether laws such as this one intend these results. The principle of non-racial discrimination clearly applies to discrimination, that are evidenced through such disproportionate impacts, that is intentional *or by effect*.⁵²

These figures are to an extent the result of a continuation of the history of poor relations between Indigenous people and the police, which are confrontational and which may be linked to the visibility of Aboriginal people in public spaces. It is difficult to see the public interest and social purpose that are served by targeting Aboriginal people in this way.

There needs to be greater vigilance from the NSW government in ensuring that there is adequate scrutiny of the operation of these laws, and indeed, serious consideration of the need for these laws to operate at all. I can see no justification for the continued existence of laws criminalising offensive language or conduct (with other, more appropriate options existing for charging people where such conduct causes harm) nor the *Children (Protection and Parental Responsibility) Act 1997* (NSW). These provisions should be repealed immediately.

This situation is, of course, not unique to New South Wales. Recent analysis of police records in Victoria from 1993 to 1997 demonstrates that many of the key concerns identified by the Royal Commission have not been addressed. In particular, public drunkenness and summary offences such as indecent language, resisting arrest and offensive behaviour remain a significant factor in Indigenous over-representation in custody, accounting for almost one quarter of all processings of Indigenous people during the period.⁵³

Indigenous offenders were also more likely to be dealt with through more formal processes such as arrest, rather than through cautioning, across all offence categories.⁵⁴ In relation to summary offences, for example, Indigenous juveniles were arrested 36.1% of the time, compared to just 15.4% for non-Indigenous juveniles; with Indigenous juveniles cautioned just 4.6% of the time compared to 35.6% for non-Indigenous juveniles.⁵⁵ This is despite recommendation 239 of the Royal Commission (for police to give preference to forms of processing other than arrest) and the existence of Victorian government instructions to police that alleged offenders should be processed according to the seriousness of the offence, with arrest only to be used in extreme circumstances and as a last resort.

Perhaps the most extreme form of public order regulation has occurred in the Northern Territory, where zero tolerance policing and trespass notices in shopping malls have combined with mandatory sentencing to produce an unwelcome

51 *ibid*, p19.

52 For detailed discussion of this obligation, see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC Sydney 2000, Chapter 3.

53 Gardiner, G, *Indigenous people and the criminal justice system in Victoria: Alleged offenders, rates of arrest and over-representation in the 1990s*, *op.cit*, pp92-93.

54 *ibid*, pp78-79.

55 *ibid*, p50.



environment for youths and Indigenous people in public spaces. This over-regulation reached new depths with the passage of the *Public Order and Anti-Social Conduct Act 2001* (NT) earlier in the year.

This Act targets a group of Aboriginal people colloquially referred to as 'long-grassers', Aboriginal people who have come into Darwin or other large towns from communities, perhaps for medical treatment or to visit family, and who sleep out in public parks in the dry season. The Act allows police to move people on from a variety of locations including public places, shops, malls, railway stations and, quite extraordinarily, from private places which are adjacent to public places, or places that are designated by regulation to fall within the scope of the Act (through a 'Place of Anti-social conduct declaration'), for example, a private residence.

The Act provides police with powers to direct a person to stop engaging in behaviour which may constitute anti-social conduct (the definition of which is highly ambiguous in section 3 of the Act), and to leave the place for 3 days and not return, detain goods which contribute to the anti-social conduct, require names and addresses of offenders, and conduct searches of the person and their property. Failure to comply with any of these directions can result in a fine or imprisonment. Police can make such directions where they have a 'reasonable apprehension' that the person 'is about to' or might engage in anti-social conduct.

If a private place is designated to be a place of anti-social conduct then its occupants forfeit a range of civil liberties. Police are then able to enter at any time (including with force), search without warrant, confiscate property and give directions to residents, visitors and passers-by. These provisions were justified by the then Police Minister by stating that people who engage in anti-social conduct *in their own homes* deserve to 'forfeit the social and legal rights that are usually attached to private places'.⁵⁶

In introducing the Bill, the then Chief Minister and Attorney-General of the Northern Territory explained the new law as follows:

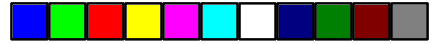
The Bill is really a matter of police knowing clearly what their powers are on activities that are not necessarily illegal but anti-social and distasteful and force law-abiding citizens to leave the area. I'm talking about drunken itinerants creating problems in public areas, taking over public areas, taking over parks so children feel unsafe going there.⁵⁷

There are a number of concerns about this explanation and the Act. First, it explicitly targets 'itinerants' or 'long-grassers' (as they were referred to in the Ministerial Statement on Law and Order which announced the Bill).⁵⁸ This is a colloquial reference to a particular group of Indigenous people in the Northern

56 Quoted in Sheldon, J, *NT Update: Public Order and Anti-Social Conduct Act (NT), Rights Now*, National Children and Youth Law Centre, Sydney, September 2001, p9.

57 Interview quoted in the Northern Territory News, 4 June 2001, and cited in Parity, *An Illusion of equity: Aboriginal homelessness and NT government policy under the Public Order and Anti-Social Conduct Act 2001*, 14(6) Parity 16, p16.

58 The Hon D Burke, *Ministerial statement to the NT Legislative Assembly – Law and order*, 5 June 2001, www.nt.gov.au/ministers/burke/speeches/01june05_laworder.shtml (Accessed 23 October 2001).



Territory.⁵⁹ Second, if such 'itinerants' are breaching the law by 'creating problems in public areas' then there is already provision to arrest them for fighting, offensive language or conduct etc under the *Summary Offences Act 1979* (NT) and *Trespass Act 1987* (NT).⁶⁰ The Act is therefore redundant to the extent that it replicates existing provisions. This leaves the real operation of the Act in that area of conduct which the Chief Minister describes as 'not necessarily illegal but anti-social and distasteful' and which forces law-abiding citizens to leave the public area.

In other words, the Act provides a wide, highly ambiguous discretion which police can exercise in 'reasonable' circumstances when there 'might' be an act of anti-social conduct at some time in the future. It allows them to direct equally law-abiding citizens to leave an area. It provides totally unwarranted levels of police discretion, with extraordinary scope for over-policing, and 'fertile ground for harassment of disadvantaged people'.⁶¹ It raises significant concerns with regard to the recommendations of the Royal Commission, as well as the International Convention on the Elimination of All Forms of Racial Discrimination (particularly Articles 2 and 5).

The newly elected government in the Northern Territory has pledged to repeal this Act in early 2002. It constitutes a particularly despicable example of discriminatory public order regulation and must be repealed at the earliest time.

This trend in relation to public order regulation is in my view one of the most distressing developments since the Royal Commission. The seriousness of this approach extends beyond the penalties that these offences impose. The Royal Commission vividly demonstrated the cycle of criminalisation that many Indigenous people fall into. These laws can operate to introduce Aboriginal people into the criminal justice system and potentially into a pattern of more serious offending.⁶² and appear to do so for limited – if any – broader social benefit.

This form of public order regulation stands in stark contrast to recent developments in relation to restorative justice mechanisms and the development of alternatives to custody which are specifically aimed to avoid incarceration and reduce such contact. It is also in contrast to broader, more holistic community governance processes which seek to deal with the cumulative, underlying factors such as poor health, education, housing and unemployment, the consequences of which are often reflected in criminal behaviour.

The inadequate level of implementation of the recommendations by all governments, accompanied by the introduction of regressive laws and policies that contradict the main goals of the Royal Commission, have most certainly

59 Parity, *An illusion of equity*, *op.cit*, p16; Senator Ridgeway, *Hansard – Senate*, 28 June 2001, p25226.

60 There are also in place Council by-laws such as ss 103,106 *Darwin City Council By-laws*, and ss 55-56 *Alice Springs (Control of Public Places) By-laws*. The use of these by-laws has also been the subject of much concern.

61 Sheldon, J, *NT Update: Public Order and Anti-Social Conduct Act (NT)*, *op.cit*, pp9-10.

62 See for example: Aboriginal Justice Advisory Council, *Policing public order, offensive language and behaviour, the impact on Aboriginal people*, *op.cit*; Hunter, B and Borland, J, *The Effect of Arrest on Indigenous Employment Prospects*, NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin 45, Sydney 1999.

contributed to the lack of progress in addressing Indigenous over-representation in the criminal justice process over the past decade.

Addressing the underlying causes of Indigenous over-representation in custody

The Royal Commission continually emphasised the central importance of addressing the underlying issues which contribute to the likelihood of contact by Indigenous people with the criminal justice system. Addressing the racial and economic exclusion faced by Indigenous people – through the oppressive control exercised by the State over every aspect of their lives and the resultant entrenched socio-economic disadvantage – was the longer term imperative identified by the Royal Commission, necessary for any change to be lasting.

Progress in addressing these issues since the Royal Commission has been unsatisfactory. Time and again, all governments have agreed on the necessity to address the underlying causes of over-representation for long term change and have committed themselves to this purpose as a matter of urgency and priority.

At the National Ministerial Summit on Deaths in Custody in 1997, for example, relevant Ministers at the Commonwealth, state and territory level (except the Northern Territory) stated that:

Ministers: (a) agree that the primary issues of concern are the significant over-representation of Indigenous people at all stages of the criminal justice process...; (c) acknowledge that addressing the underlying issues is fundamental to the achievement of any real, long term solutions to the issue of indigenous incarceration and deaths in custody; and (d) recognise that it will take the combined effort of Commonwealth, State and Territory Governments and Indigenous people and the wider community to effectively address Indigenous over-representation.⁶³

Accordingly, they agreed the following resolution:

To address the over-representation of Indigenous peoples in the criminal justice system Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans for the coordination of Commonwealth, State and territory funding and service delivery for Indigenous programs and services, including working towards the development of multilateral agreements between Commonwealth, State and Territory governments and Indigenous peoples and organisations to further develop and deliver programs. The focus of these plans will address: underlying social, economic and cultural issues; justice issues; customary law; law reform; funding levels and will include: jurisdictional targets for reducing the rate of over-representation of Indigenous people in the criminal justice system; planning mechanisms; methods of service delivery; monitoring and evaluation.⁶⁴

The then Social Justice Commissioner and the Aboriginal and Torres Strait Islander Commission (ATSIC) attended the Summit and refused to be signatories to this resolution. This was due to concerns that 'the summit outcomes

63 Reproduced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1996-97 – Fifth report*, HREOC Sydney 1997, pp153-54.

64 *ibid.*



unfortunately replicate the vague, generalised approaches of the past which have been marked by refusal to commit to achieving specific measurable outcomes within specific time frames'.⁶⁵

State governments had resisted attempts to specify a timeframe for the coordination of Commonwealth – State funding and service delivery arrangements and the development of multi-lateral agreements, or even, as proposed by the federal Attorney-General, to commit to the resolution to the 'prompt' development of strategic plans for such coordination. The Commonwealth government also used the Summit to effectively withdraw from processes to implement the Royal Commission, seeing it as almost exclusively a responsibility for the states and territories.⁶⁶

The Ministerial Summit commitment was not the first such commitment that had been made to coordination of service delivery, reduction of Indigenous disadvantage and participation of Indigenous organisations. The *National Commitment to improved outcome in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders* had been made by the Council of Australian Governments in 1992.⁶⁷ It committed governments to negotiate national benchmarks and targets, and to put into place adequate statistical collection, monitoring and evaluation mechanisms after consultation and with the participation of Indigenous communities and organisations. A revised national commitment was made by the Council of Australian Governments in November 2000 through their National Communiqué on reconciliation.⁶⁸

The Ministerial Summit commitment and the COAG National Commitment have been largely not implemented. Government programs and inter-governmental coordination continue to lack sufficient accountability and transparency. On 26 September 2001, the Senate once more called for a renewed commitment by the federal government to address these issues, by calling for it to reaffirm:

its commitment to addressing the unacceptably high levels of social, economic and cultural disadvantage experienced by Aboriginal peoples and Torres Strait Islanders in recognition that this disadvantage contributes to Indigenous over-representation in our gaols; and in consultation with Aboriginal peoples and Torres Strait Islander and their representative organisations, as well as state and territory governments, to commit to reviewing the rate at which Indigenous persons appear in court and the rate at which they are taken into custody.⁶⁹

There have, however, been some pleasing developments by state governments in relation to the 1997 Ministerial Summit in the past two years. Justice Agreements have been concluded with representative Indigenous organisations in most states, which are broadly in line with the commitment to the development of multilateral agreements for the coordination of Commonwealth – State funding and service delivery arrangements. Notably, however, the state with the second

65 *ibid*, p137.

66 *ibid*, pp153-54.

67 For a discussion of the National Commitment see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, HREOC Sydney 2000, Chapter 1.

68 This is discussed in more detail in chapter 6 of this report.

69 Senator Ridgeway, Motion, *Hansard*, Senate, 26 September 2001, pp27281-82.



highest rate of over-representation – New South Wales – has not begun to develop such an agreement.

The Victorian Aboriginal Justice Agreement came into effect from July 2000 and seeks to implement a whole-of-government approach to tackle over-representation of Indigenous Australians in criminal justice system by also tackling Indigenous disadvantage. It also re-commits the government to 'a rigorous monitoring process across the whole of government with the reintroduction of annual reporting to Parliament' on the Royal Commission recommendations, while also re-assessing the recommendations to counter growing social problems such as gambling and illicit drugs.⁷⁰

The most extensive, and recent, of these agreements is the Queensland Aboriginal and Torres Strait Islander Justice Agreement that was signed on 19 December 2000. The agreement addresses one of eight key priorities (alongside family violence, reconciliation, economic development, community governance, service delivery, human services and land, heritage and natural resources) adopted by the Queensland government in what has become known as the 'Ten year partnership'.

The Justice Agreement sets as its long term goal that 'the rate of Aboriginal and Torres Strait Islander peoples coming into contact with the Queensland criminal justice system be reduced to at least the same rate as other Queenslanders'. The government has agreed with Queensland Indigenous representatives that the appropriate measurable outcome for this is 'a reduction by 50% in the rate of Aboriginal and Torres Strait Islander peoples incarcerated in the Queensland criminal justice system by the year 2011'.⁷¹ with a range of supporting indicators including reductions in the number of Indigenous people being arrested, coming before courts, being given custodial sentences, as well as an increase in the proportion of Indigenous people being cautioned (corresponding to a reduction in contact through the rest of the criminal justice system) and an increase in community service orders rather than incarceration,⁷²

The agreement is based on the principles of ensuring Indigenous participation, recognition of culture, acknowledgement of the past, respect for Indigenous cultural values, equality before the law, improved coordination of government services, empowerment and self-determination, addressing underlying issues, and implementing the Royal Commission recommendations.⁷³ The agreement makes explicit that it is not legally binding, but operates instead at the level of a formal public commitment by government.⁷⁴

The adoption of measurable outcomes and targets with monitoring and evaluation mechanisms through agreements like the Queensland and Victorian ones are a welcome, if somewhat belated response to the issues raised by the

70 Government of Victoria, *Victorian Aboriginal Justice Agreement – a partnership between the Victorian government and the Aboriginal community*, Victorian Aboriginal Justice Committee, Melbourne 2000, p3.

71 Queensland Government, *Queensland Aboriginal and Torres Strait Islander Justice Agreement*, Queensland Government, Brisbane 2001, p11.

72 *ibid*, p18.

73 *ibid*, p12.

74 *ibid*, p11.



Royal Commission. Now they must turn the rhetoric of these commitments into action.

One of the consequences of the lack of implementation of commitments such as the Ministerial Summit and COAG National Commitment has been the lack of priority and urgency with which governments have pursued the task of addressing Indigenous disadvantage over the past decade.

I discuss the approach of governments in addressing Indigenous disadvantage in more detail in chapters 2, 3 and 6 of this report. In brief, redressing Indigenous disadvantage is not merely something that is desirable, but is a matter of obligation in order to guarantee a free and equal society. Governments must take deliberate, concrete steps which are targeted as clearly as possible to reducing existing inequalities as quickly and efficiently as possible through the adoption of benchmarks and targets. Adequate monitoring and evaluation mechanisms are necessary in order that governments will be held accountable to do more than simply manage the existing inequalities in society. This is particularly so where the disadvantage that exists is the consequence of historic systemic discrimination against a particular racial group.⁷⁵

In last year's report I argued that current funding arrangements are not adequate to meet this objective in a number of ways:

Despite the commitment of significant resources to redress Indigenous disadvantage, there is very little to indicate the priority that governments attach to reducing the inequalities. The 2000 budget paper on Indigenous policy notes the 'record amount... allocated to targeted Indigenous specific programmes'... At no stage does it identify the reduction of the disparities in enjoyment of rights between Indigenous and non-Indigenous people as the government's purpose... Also missing from current funding and service delivery arrangements are adequate performance targets, benchmarks and mechanisms to ensure government accountability and transparency...⁷⁶

I also noted that current approaches do not provide sufficient support for Indigenous participation in the design and delivery of services, the setting of priorities and decision making, or for building Indigenous capacity to manage services; and are not sufficiently coordinated between government agencies or across governments.

The Commonwealth Grants Commission has also noted that mainstream government services, in urban, rural or remote areas, are not accessible to Indigenous people on an equitable basis:

Mainstream services are intended to support access by all Australians to a wide range of services. Given the entrenched levels of disadvantage experienced by Indigenous people... it should be expected that their use of mainstream services would be at levels greater than those of non-Indigenous Australians. This is not the case ... mainstream services do not meet the needs of Indigenous people to the same extent as they meet the needs of non-Indigenous people. In general, Indigenous people

75 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit.*, pp24-25.

76 *ibid.*, p89.



experience greater disadvantage and have greater needs than non-Indigenous people and, for geographic, economic and cultural reasons, mainstream services are less accessible to them.⁷⁷

I have also expressed major reservations in my previous social justice reports about the federal government's overall approach to Indigenous disadvantage, as expressed through the catchcry of 'practical reconciliation'.⁷⁸ This approach draws distinctions between 'practical' or 'real' issues and those issues which are categorised as being merely 'symbolic'. It emphasises addressing Indigenous disadvantage in the key areas of health, housing, education and employment as the real issues whereas other issues, across an ever-expanding range, such as recognition of rights to land and culture, reparations for forcible removal, a treaty process, and self-determination are not seen as of practical benefit. This approach was taken even further in the past year when the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs proclaimed that public concerns about levels of violence and abuse in Indigenous communities had assured the ascendancy of the practical reconciliation approach over a rights based agenda.⁷⁹

'Practical reconciliation' retreats from the approach of the Royal Commission in two significant ways. First, it strips Indigenous disadvantage of its historical context. Over-representation in criminal justice and care and protection processes, high levels of domestic violence and abuse, as well as poor educational attainment and health and high unemployment are not addressed as matters which are fundamentally a consequence of the history of dispossession, protection and control. Practical reconciliation admits no contemporary, ongoing consequences of this history. Consequently, there is nothing particularly distinctive about Indigenous disadvantage or about the response necessary to it.

An illustration of this approach is the suggestion by the federal government to the recent Commonwealth Grants Commission Inquiry into Indigenous funding need, that the needs of Indigenous people living in urban areas should be met by mainstream programs so that specific Indigenous funding programs can focus on addressing issues facing Indigenous people in rural and remote areas. The Commonwealth Grants Commission rejected this suggestion as too simplistic. They found that there are significant problems in access to mainstream health, housing and employment services for Indigenous clients in urban areas as they are planned and delivered for the common user. As a result they are unable to cope with the level of disadvantage or special needs of Indigenous people, and may be inaccessible for cultural reasons. In the case of health and housing services, they may be inaccessible due to the historic low income and

77 Commonwealth Grants Commission, *Report on Indigenous funding*, Commonwealth of Australia, Canberra 2001, pp59, 43.

78 For example: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, Chapter 1; *Social Justice Report 2000*, pp21-27, pp57-64, and Chapter 4.

79 Ruddock, P, *Aborigines reach a turning point*, *The Age*, 23 July 2001, p15. See also: Jonas, W, *Moving forward – from 'practical reconciliation' to social justice*, Speech, *Moving Forward: Achieving reparations for the stolen generations*, University of New South Wales, Sydney 15 August 2001, www.humanrights.gov.au/movingforward/. This issue is discussed in greater detail in chapter 6 of this report.



lack of accumulated wealth of Indigenous families, resulting from inter-generational poverty.⁸⁰

Second, the constrained approach of practical reconciliation does not seek to transform the relationship between government and Indigenous people. It seeks to maintain the existing structure in the delivery of services. Accordingly, it does not change the unequal basis of the relationship and leaves Indigenous people disempowered. Change to this power dynamic, through the effective participation of Indigenous people in decisions that affect them, was seen as a central requirement by the Royal Commission.

Lessons for the future

I have not examined the inadequacy of governmental responses to the Royal Commission simply in order to reminisce or shrug my shoulders at what could have been. The experiences and the mistakes of the ten years since the Royal Commission must be built on in order to frame a better future. Indigenous communities cannot afford a continuation of present rates of incarceration and deaths in custody.

This report examines a number of crucial developments in the current approach of governments to social justice for Indigenous people: namely, policies regarding welfare dependency and initiatives for developing Indigenous community governance capacity; the importance of the principle of imprisonment as a last resort and the availability of alternatives to detention; and the progress of the reconciliation process.

Throughout the report I return to the concerns that have been raised in this introduction. For example, what is the nature of the commitments that have been made by governments at the end of the reconciliation process? What is the process for implementing reconciliation, how does it assure Indigenous participation and how does it overcome the flaws and problems identified by the Royal Commission? How do current approaches seek to facilitate Indigenous control and empowerment?

The next section considers the current debate about Indigenous welfare dependency. Chapter 2 analyses recent welfare reform initiatives which have taken place on the basis of mutual obligation and practical reconciliation. Chapter 3 then considers the need for a more holistic approach to Indigenous economic marginalisation which provides greater emphasis on the development of Indigenous community governance capacity. The chapter provides two detailed case studies of differing approaches to capacity building and service delivery, which demonstrate the ingenuity and determination of Indigenous communities to control their destinies and move beyond welfare dependency.

The following section then examines two contradictory approaches to criminal justice reform which have been integral to the approach of the Western Australian (WA) and Northern Territory (NT) governments in recent years – namely, so called ‘mandatory sentencing’ laws and juvenile diversionary schemes. It is a great irony that diversionary schemes – based on the principle of providing alternatives to custody and the use of imprisonment as a sanction of last resort

80 Commonwealth Grants Commission, *op.cit.*, pp61-3.

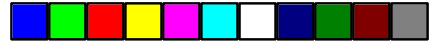


– should be introduced in the NT as a measure to run concurrently with mandatory sentencing and that both diversion and mandatory sentencing should be so integral to the crime prevention approach of the WA government. These two approaches are clearly contradictory and work towards opposite goals.

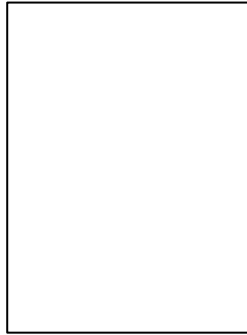
Chapter 4 provides an overview of recent developments in relation to mandatory sentencing laws in both WA and the NT. Chapter 5 then examines diversionary schemes for juvenile offenders in these jurisdictions and assesses them against human rights standards. These chapters fulfil the requirements of a review requested by the Senate that I had indicated I would undertake through the normal performance of my functions.

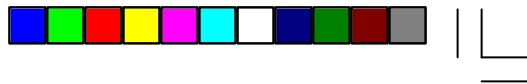
The final section of the report then examines the progress towards reconciliation in the first year since the term of the Council for Aboriginal Reconciliation ended. It examines the level of commitment made at the national level to progress reconciliation and to achieve real change to the lives of Indigenous people rather than merely being a populist movement based on the expression of kind sentiment.

The lack of progress in addressing the concerns of the Royal Commission offers us a stark reminder of what is at stake in this country with reconciliation. As a society, we cannot afford to look back in ten years time on the reconciliation process with the same regrets that we now do on the Royal Commission.



**Beyond welfare dependency:
mutual obligation,
community empowerment and
effective participation**







Chapter 2

33

Mutual obligation, welfare reform and Indigenous participation: a human rights perspective

In recent years a mutual obligation approach has been adopted to reform public policy on welfare and employment issues. There has been much discussion about the applicability of this approach within an Indigenous policy context. It is seen by many as consistent with Indigenous cultural values such as reciprocity and an emphasis on community, as well as suggesting an antidote to the damage caused by intergenerational poverty, of which long-term welfare dependency and a crippling short-term local cash economy are often features. This chapter evaluates the appropriateness of a mutual obligation approach to addressing the deeply entrenched and severe disadvantage and marginalisation faced by Indigenous people from the perspective of human rights standards. There exists in Australia a history of seeking administrative solutions to issues related to Indigenous economic marginalisation. We should not rush to a wholesale acceptance of a mutual obligation policy approach on the basis of a superficial attractiveness and apparent consistency with Indigenous cultural values or for reasons of political expediency. Consideration must be given to whether such an approach actually empowers Indigenous people and communities to take control of their lives and be self-determining. On this basis, we must question the ease with which an emphasis on 'welfare dependency' and 'self reliance' has distracted attention from the broader spectrum of issues related to the economic marginalisation faced by Indigenous people.

Mutual obligation and welfare reform

A mutual obligation approach has formed the philosophical basis for reform of the welfare system by the present Federal Government since its election in 1996.

The mutual obligation principle asserts that the provision of government assistance is not simply a matter of right or entitlement, but something that must be reciprocated by the citizen through meeting a range of obligations and responsibilities. In the context of welfare reform, the onus has shifted from the State's obligation to provide



income support for those citizens unable to exercise their right to work (temporarily or otherwise) to the obligation of the unemployed citizen to perform certain duties - such as seeking work, undertaking training or accepting temporary employment - in exchange for this support. In a speech delivered to the National Press Club, titled 'The future of welfare in the 21st century', the Minister for Family and Community Services outlined the government's rationale for a mutual obligation approach to welfare reform as follows:

A modern safety net is not about blaming the victim, or penalising or punishing disadvantaged people. Nor is it necessarily about more government intervention or throwing money at problems. It is about helping people avoid and move out of welfare dependency and giving them real opportunities. And, it is about people on government payments accepting responsibility and an obligation to help themselves by making a contribution to the economy and society as much as they can.¹

This approach has its origins in the liberal democratic notion of a social contract existing between individual citizen and state.² Under this contract, 'all members of society have obligations to sacrifice certain individual freedoms in the pursuit of collective advantage and mutual benefit'.³ In mutual obligation policies an understanding of this contract is being re-worked in terms of individuals' obligations 'to live off their own (or their family's) labours, to be self-reliant rather than reliant on others and to avoid being a burden to fellow citizens'.⁴

This approach is accompanied by an understanding that some form of active participation, geared toward developing greater 'self reliance', is preferable to 'welfare passivity' or 'dependency'. This shift in public policy has been presented as a necessary development in the face of social and economic change that has meant the State is unable to sustain the former standards of its social security net due to factors as diverse as the impact of rapid globalisation, advances in technology and an ageing population.

Many of the principles which underpin this approach are imported from public policy developments, characterised as a 'Third Way in Politics', in other western democracies. These include 'workfare' introduced by President Clinton in the United States in 1996 and the offer of a 'New Deal' to the unemployed by British Prime Minister Tony Blair in the United Kingdom in 1997.⁵

Australia's social security system has always had some degree of compulsion built into the receipt of income support since its introduction in the 1940s, such as requirements that recipients engage in job-seeking or some other form of approved activity in return. However, since the late 1980s there has been greater public acceptance of the notion that obligations should be required of benefit recipients,

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- 1 Newman, The Hon J, 'The future of welfare in the 21st century', *Speech*, National Press Club, Canberra, 29 September 1999, p1.
 - 2 See Kinnear, P, 'Mutual obligation: Ethical and social implications' (August 2000) Discussion Paper Number 32, the Australia Institute, Canberra, pp10-22, for a detailed discussion of the origins of a social contract in seventeenth and eighteenth century philosophy.
 - 3 *ibid*, p14.
 - 4 *ibid*, p11.
 - 5 Scanlon, C, 'The network of moral sentiments: The third way and community' (2000) 15 *Arena journal* 59, pp57-79.



accompanied by increases in the level of conditionality of income support programs.

Following a major review of the welfare system in 1988, the Hawke and Keating governments introduced a range of modifications to labour market programs to ensure greater compliance by income support recipients through targeting and providing incentives to encourage work and reduce welfare dependence. This emphasis on 'reciprocal obligation' was crystallised in the 1994 white paper on employment, *Working Nation* of which the Job Compact for the long-term unemployed was central. Through this initiative, the Government sought to provide the long-term unemployed with a guaranteed job within 6-12 months along with a program of targeted assistance. This was accompanied by high penalties for unemployed people who did not accept a reasonable job offer.

When the Coalition came into government in 1996 *Working Nation* was replaced by more market-oriented initiatives which included the downsizing of labour market programs, deregulation of the training market, and privatisation of the employment assistance service with the introduction of Job Network from May 1998. In accordance with the mutual obligation principle, tighter requirements were introduced for the receipt of benefits and harsher penalties enforced for failure to comply (such as the 'breaching' of the activity test).

A major pillar of this approach has been the Work for the Dole (WFTD) program, which was piloted in November 1997, then steadily increased from 25 000 places in 1998-99 to 50 000 places a year by July 2000. The WFTD program requires income support recipients to 'actively seek work, constantly strive to improve their competitiveness in the labour market, and give something back to the community that supports them'.⁶ It encourages greater self-reliance and specifies three broad classes of activities - employment and community participation, training and intensive assistance - for fulfilment of mutual obligation requirements. From 1 July 2000 all income support recipients were required to sign a 'Preparing for Work Agreement' that stipulates commitments to undertake activities to seek work.

In September 1999 the Minister for Family and Community Services announced the government's intention to conduct a wide-ranging review to examine such issues such as inefficiencies of the welfare system, welfare dependency (especially intergenerational), and ways of countering the problems that result from a reliance on income support.⁷ On 17 August 2000 the Reference Group on Welfare Reform delivered its final report, *Participation Support for a More Equitable Society* (the 'McClure Report').

The report found that the existing social support system was no longer appropriate to the current social and economic environment, and that it was failing those it was intended to support. It argued that the system needed to be transformed to increase people's opportunities for social and economical participation to avoid the creation of long-term disadvantage and intergenerational cycles of joblessness. Principal failings of the current social system identified were: fragmented service delivery arrangements with inadequate participation goals; overly complex and rigid

6 Parliament of Australia Parliamentary Library, 'Current issues: Social Policy Group: Welfare review', Parliament of Australia, Canberra, 2000, p6.

7 *ibid*, p2.



categories of pensions and allowances; inadequate incentives for participation and inadequate rewards for work; and insufficient recognition of participation. The report put forward five inter-related features for effective reform and development of a participation support system:

- *Individualised service delivery* – income support is to promote social and economic participation consistent with individual capacities and circumstances, and service delivery will assist individuals in identifying and achieving participation goals;
- *A simpler income support structure* – development of a ‘dynamic and holistic system that will recognise and respond to people’s changing circumstances over their life cycle and within their own family and community context’;⁸
- *Incentives and financial assistance* – to encourage and enable participation in line with people’s differing circumstances and the cost of participation;
- *Mutual obligations* – ‘underpinned by the concept of social obligations. Governments, businesses, communities and individuals all have roles. Governments will have a responsibility to continue to invest significant resources to support participation. Employers and communities will have a responsibility to provide opportunities and support. Income support recipients will have a responsibility to take-up the opportunities provided by government, business and community, consistent with community values and their own capacity’;⁹ and
- *Social partnerships* – a key strategy for building community capacity to increase social and economic participation in which business and the community are to play a major role through four processes: community economic development, fostering micro-businesses, community business partnerships and social entrepreneurship. This strategy seeks to go beyond a traditional philanthropic or fundraising approach to invest genuine social capital (stronger networks, trust and shared values) in communities.

The government responded in part in December 2000 by committing to build a new welfare system that retains the social safety net for the disadvantaged but provides incentives for increased economic and social participation. The government endorsed the broad direction of the McClure Report and its five principles, including development of ‘a simplified welfare system that encourages people to participate in mutual obligation activities according to their ability’.¹⁰ It also committed to making welfare reform one of the highest funding priorities of the 2001-02 Budget and to developing a consultative forum, with representatives from the welfare, business and community sectors, to gain views on the design

8 McClure, P, (Chair), *Participation Support for a more equitable society: Final report of the reference group on welfare reform*, Department of Family and Community Services, Canberra, July 2000, p6.

9 *ibid.*

10 Newman, the Hon J, ‘Welfare reform encourages people to reach potential’, *Media release*, 14 December 2000; Department of Family and Community Services, *Government response to the final report – Ministerial statement*, www.facs.gov.au/internet/facsinternet.nsf/whatsnew/welfare_reform_background.htm (11 December 2001). See ACOSS, ‘Still a long road ahead for fair welfare reform’ (February 2001) *Impact*, p6, for some discussion of the Government’s response to McClure.



and implementation of future measures before the Budget. They did not, however, give specific details of a budgetary investment to support the report.

While some aspects of the Government's response received cautious support from the Australian Council of Social Services (ACOSS), President Michael Raper criticised it on the grounds that:

People had a right to expect a guaranteed funding package (not just a promise to give it 'high priority' in the coming Budget); a commitment to increase inadequate payment rates; a guarantee of effective employment for all long-term jobless people; and a reduction in the harsh penalties.¹¹

To date the welfare reform package ('Australians Working Together') that formed the centrepiece of Budget 2001 represents the government's most substantial response to the McClure Report. 'Australians Working Together' included modifications of existing government employment assistance and mutual obligation policies to improve personalised assessment and service, and to increase training and work experience opportunities as well as earnings and incentives to work. It introduced initiatives in the following areas: a Working Credit to support part-time and temporary casual work; a Personal Support Programme to assist those whose personal problems deterred them from finding work; and a Transition to Work Programme to help parents, carers and mature job seekers returning to the workforce. There were also enhancements to the Intensive Assistance scheme, extra WFTD places and opportunities for community work, and new Training Credits for jobseekers to gain work-related skills.

The 'Australians Working Together' package committed \$1.7 billion over a four-year period to welfare reform, with much of the expenditure to begin in July 2002. The budget also estimated a 'claw back' of \$800 million from this figure, with the implication that this money would come from people moving off welfare payments. However, in light of projected increases in unemployment figures, the money is more likely to come from penalties. As it stands, the package falls short of the \$1 billion recommended by McClure to address welfare reform over the next four years. ACOSS estimates indicate that a budget commitment of \$4 billion over the next 2 years is necessary to achieve the structural change for genuine welfare reform.¹² There are as yet no indications as to whether the government intends to implement the McClure Report's recommendations in their entirety.

Mutual obligation – some general concerns

There are a range of concerns about the current approach to mutual obligation and welfare reform. This section will consider those for which the impact is often exacerbated in the case of Indigenous people. The following will consider mutual obligation within the framework of practical reconciliation, the broader context of addressing Indigenous disadvantage and Indigenous specific welfare and employment programs.

11 ACOSS, *ibid.*

12 See ACOSS, 'Benchmarks for fair welfare reform: Adequate incomes, real opportunities and fair obligations' ACOSS Info 303 www.acoss.org.au/info/2001/303.htm (May 21 2001).



Article 6 of the International Covenant on Economic, Social and Cultural Rights emphasises the obligation of the State to support the individual's right to work in equitable, non-coercive terms, by requiring the State to 'recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' and to take appropriate steps to safeguard this right. Article 6(2) also provides that the State must take steps 'to achieve the full realization of this right [including] technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment' while doing so 'under conditions safeguarding fundamental political and economic freedoms to the individual'.

The mutual obligation approach has been criticised for the conditionality and coerciveness of the contract that it creates between the State and citizen, which results in an unbalanced and inequitable focus on the obligations of the unemployed.¹³ To ensure equity, the justness of the mutual obligation contract needs to be established. This means that the terms on which the State institution places obligations on the income support recipients in exchange for rights to welfare entitlements must be fair. The equitable treatment of income support recipients should also be ensured through enabling them to exercise a reasonable level of consent in accepting the conditions for receipt of entitlements. That is, the relationship should not be a coercive one: the income support recipient should be in a position to have 'voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests'.¹⁴ However, rather than providing the unemployed with a greater level of choice and opportunity to realise what should be a right to work, the aim of the current mutual obligation policy is to:

increase the attractiveness of work compared to welfare through a combination of welfare conditionality and in-work benefits. The former is designed to modify the behaviour of social security recipients (possibly through coercive measures) in order to make them more prepared to seek (paid) work, while the latter is intended to make the transition to work more financially attractive to them. The differences arise in the scope and severity of conditionality and in the nature of the tax, benefit and labour market changes designed to increase the attractiveness of work.¹⁵

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- 13 See Kinnear, P, *op.cit.*, for further discussion of a social justice basis for mutual obligation within contract theory. For some critique of the current mutual obligation approach see also Yeatman, A, 'Mutual Obligation: What kind of contract is this?', in Shaver, S, and Saunders, P, (eds), *Social policy for the 21st century: Justice and responsibility*, Vol.1, SPRC, NSW, Sydney, 1999, pp255-68 and Raper, M, 'Examining the assumptions behind the welfare review', in Saunders, P, (ed), *Reforming the Australian welfare state*, Australian Institute of Family Studies – Commonwealth of Australia, Melbourne, 2000, pp250-70.
- 14 Rawls, J, *A theory of justice*, Oxford University Press, Oxford, 1973, pp111-12, quoted in Kinnear, P, *ibid*, p15.
- 15 Saunders, P, 'The changing social security policy context: Implications for the CDEP program', in Morphy, F, and Sanders, W, (eds), *The Indigenous welfare economy and the CDEP Scheme*, CAEPR Research Monograph No.20, CAEPR, Canberra, 2000, p24.



Anna Yeatman has described the mutual obligation contract between unemployed citizen and the State as 'a contract between unequals where the function of this inequality is to provide a paternalistic direction to the individual who is thus positioned as the client of the more powerful party to the contract.'¹⁶ The harsh penalties incurred through the breaching of current income support requirements provides an example of how increased levels of coerciveness have resulted in the inequitable treatment of unemployed citizens by the State.

Penalties for breaching

Breaching refers to the penalties imposed on income support recipients (Newstart and Youth Allowance) who fail to meet the Activity Test and other administrative requirements. Ongoing payment of benefits is dependent on meeting the Activity Test, a threshold set to indicate that the unemployed person has made reasonable efforts to find work or to improve their employment opportunities. The Activity Test includes requirements that unemployed people apply for up to 10 jobs per fortnight (subject to some discretion on behalf of Centrelink officers), and participate in mutual obligation activities such as WFTD, Green Corps or the Job Placement, Employment and Training Programme.

Penalties may be imposed for not meeting requirements such as attending an interview, contacting a Job Network member within 7-14 days, declaring earnings correctly from employment and voluntary unemployment.¹⁷ Failure to meet administrative requirements such as return of a review form also constitutes breaching. Penalties for breaching the Activity Test mean a reduction or cancellation of payment – the rate of reduction relates to whether a breach has occurred in the last two years. At present, the rate of payment reduction is 18% for 26 weeks for a first breach; 24% reduction for 26 weeks for a second; and 8 weeks with no payment for a third breach. All administrative breaches incur a 16% reduction for 13 weeks.¹⁸ On this basis, unemployed people can face penalties of between \$837 and \$1,431 for breaches such as the failure to attend an appointment.

ACOSS points out that these penalties are 'disproportionate and unjustifiably harsh compared to those applied by Magistrate Courts for criminal convictions'.¹⁹ Their research also found that breaches were sometimes applied without seeking a 'reasonable excuse' from income support recipients. Breaches can be overturned through appeal, which often means greater financial hardship while the person seeks to justify his or her situation.

Research conducted by ACOSS has shown an 'explosion' of Activity Test breaches over the past three years, with a 310% increase since June 1998 (and a particularly high rate of increase during the eight months from July 2000). Overall, they estimated 'approximately 349,100 breaches applied for the 2000-01 year represent[ing] a 189% increase in the number of penalties applied in the three years

16 Yeatman, A, *op.cit*, p264.

17 ACOSS, 'Breaching the safety net: The harsh impact of social security penalties' ACOSS Info 305 www.acoss.org.au/info/2001/305x.htm (14 December 2001) p7.

18 *ibid*, p10.

19 *ibid*, p3.



from June 1998'.²⁰ During 2000-1, an estimated total of \$258.8million in penalties was imposed on unemployed people:

This amount represents a cost to the individuals penalised, their families and also the broader community that is called on to provide additional support during periods of reduced or no payment. While this amount is also a 'saving' to the Government, it comes at the cost of tremendous hardship and increased poverty among unemployed people, as well as the extra cost that is passed on to charities and community welfare agencies.²¹

In addition, ACOSS and others have drawn attention to the burden that these harsh and inequitable penalties place on already disadvantaged jobseekers, including 'homeless people; people with mental illness; jobseekers with drug and alcohol related problems; people with literacy and numeracy problems; people who have acquired brain injuries; young people; and Indigenous Australians'.²²

Research conducted by the Centre for Aboriginal Economic Policy Research (CAEPR) and commissioned by the Department of Family and Community Services (DFACS) indicated that during the period June 1997 to March 1998 national breach rates were 'consistently higher among indigenous identifiers by a factor of about one-and-a-half in relation to activity test breaching and a factor of two in relation to administrative breaching'.²³ Factors identified for the higher rates of Indigenous breaching included lower levels of literacy and higher rates of mobility amongst the Indigenous population; lack of confidence dealing with bureaucracies; a lower propensity to seek appeal or review of breaching; inadequate postal services to some remote and rural areas; lack of appreciation of difficulties for Indigenous people seeking employment; unfamiliarity with Centrelink teleservices; and CDEP and Abstudy administrative issues.

The study further identified features of income support and employment assistance administration such as 'general tensions and ambiguities in income support administration, different office cultures and roles, the cultural and social content of rules and procedures and the diversity of the unemployed'²⁴ as having significant impacts on Indigenous benefit recipients. A recent DFACS paper stated that in 1999 to 2000, 'almost 1 in 2 Indigenous people in some centres – notably in some of Sydney's western and inner suburbs have incurred breaches',²⁵ which demonstrates the continuing vulnerability of the Indigenous unemployed to the current penalty system.

The penalty system for breaching demonstrates one of the more damaging implications of mutual obligation policy. It holds unemployed citizens chiefly responsible for their employment status while downplaying the accountability of

20 *ibid*, p5.

21 *ibid*, p2.

22 *ibid*. See also ACOSS, 'Call for suspension of third breach penalties of 8 weeks no payment', ACOSS media release, 13 August 2001.

23 Sanders, W, *Unemployment payments, the Activity Test and Indigenous Australians: Understanding breach rates*, research monograph no. 15/1999, CAEPR, Canberra, 1999, p114.

24 *ibid*, p114.

25 Moses, J, and Sharpels, I, 'Breaching – History, trends and issues', Paper 7th National Congress on Unemployment, Sydney, 30 November – 1 December 2000, cited in ACOSS, 'Breaching the safety net', *op.cit*, p22.



the State to generate the circumstances for increased employment opportunities for its citizens.²⁶

This level of coercion at the individual level also stands in marked contrast to the ambiguity and lack of enforcement of the obligations of business and other sectors of the community.

The McClure Report's commitments to mutual obligations underpinned by social obligations and social partnerships entail recognition of the importance of obligations and responsibilities 'across the whole community, not just between the government (on behalf of the community) and the individual in receipt of income support',²⁷ including corporate entities such as business enterprises and trade unions.²⁸ At the same time a strong emphasis remains on ensuring the contribution of (unemployed) individuals to the 'community': 'Income support recipients will have a responsibility to take-up the opportunities provided by government, business and community consistent with community values and their own capacity.'²⁹

However, given that individuals at the bottom of the labour market face harsh penalties for 'breaching', it is reasonable to request that forms of compliance and regulation be applied to ensure that business meets its social obligations. Some strategies suggested to increase corporate mutual responsibility include: tax breaks, preferred tendering to businesses that, for example, recruit or train Indigenous people, and bonus payments from government to businesses that contribute to the community.³⁰ The McClure Report recommends:

... establish[ing] a national framework of triple bottom line (social, environmental and economic) auditing for the corporate sector sponsored by the Prime Minister's Community Business Partnership with business organizations and professional associations.³¹

In considering options for extending obligations and responsibilities across the community, the viability of developing community capacity and enhancing social capital through social partnerships involving business stakeholders also needs to be assessed.³² Notions of forming partnerships are often largely based on assumptions of good will, and the inequalities between business and other players, including issues such as the precarious position of some disadvantaged communities and whether they can offer business adequate incentives to work with them, need careful consideration.

26 Kinnear provides a useful table outlining the range of possibilities, from 'willing but unable due to lack of jobs' through to 'unwilling to work despite availability of jobs and absence of any inhibitor', noting in regard to the former option that '[c]urrent policy side-steps this issue.' See Kinnear, P, *op.cit.*, p18.

27 McClure, P, *op.cit.*, p5.

28 *ibid.*, p56.

29 *ibid.*, pp6, 46.

30 ATSIC, 'Social Welfare Reform: ATSIC submission', CDEP and Employment Policy Branch, Canberra, January 2000, p15.

31 McClure, P, *op.cit.*, p41.

32 *ibid.*, p46.



Mutual obligation and equality

A formal equality approach is evident in aspects of mutual obligation policies for the Indigenous and mainstream communities. Much mutual obligation discourse operates on the assumption that all citizens are on a more or less equal footing, that there is little difference between their circumstances, and that most people exercise a degree of choice in regard to their current situation, whether employed or in receipt of income support. This outlook is implicit, for example, in the Prime Minister's delineation of self reliance as one of the chief values of the Australian Way:

The first of these principles goes to the heart of the Australian ethos, to the heart of our national self-image and to the hopes we hold for ourselves and for our children – Self Reliance. We believe, as we always have, that 'the only real freedom is a brave acceptance of unclouded individual responsibility'. And in making policy since we took office, that encouragement of self reliance, of giving people choice, of rewarding those who can and do take responsibility for themselves and their families has been at the forefront of our efforts.³³

As Yeatman comments: 'the new discourse of self-reliance is non-discriminatory and egalitarian in its assumption that each individual would prefer to be self-reliant if they could be.'³⁴ This focus:

implicitly assumes that social and economic change should be driven through changes in the circumstances, skills and opportunities of individuals. Equally, it assumes that the wider social problems which are associated with welfare dependency can be addressed through changing the circumstances of individual lives.³⁵

To this end, the McClure Report, for example, proposed 'a model of individualised service delivery' that 'offers targeted assistance based on an individual's needs, capacities and circumstances' to 'enable individuals with very different levels of need for assistance to be streamed into levels of service intervention based on their capacity for economic and social participation.'³⁶

To date there has been a lack of sensitivity to the specific circumstances of individuals in the application of measures that support the notion that unemployed citizens would prefer to be self-reliant, but lack the effective capacity in terms of training, education, and expertise.³⁷ The educative aspect of programs such as Work for the Dole, for example, has been found to possess limited relevance to furthering the employability of income support recipients, which makes the purpose and value of increasing obligations for individuals in addition to existing obligations

33 Howard, The Hon J, 'Transcript of the Prime Minister the Hon John Howard MP - Melbourne Press Club address', *Speech*, 22 November 2000, p1.

34 Yeatman, A, *op.cit*, p256.

35 Martin, D, 'Community development in the context of welfare dependence', in Morphy, F, and Sanders, W, *op.cit*, p33.

36 McClure, P, *op.cit*, p10, 12. McClure's model does however draw on social partnerships with other stakeholders, the implications of which are discussed below.

37 The McClure Report factors emphases on assessment of individual circumstance and the need for the broader community to exercise obligations to the unemployed, particularly through capacity-building and partnerships, into its proposals for a Participation Support System. See discussion below.



to seek employment questionable.³⁸ The scheme lacks 'substantial employment experience in mainstream jobs (which was offered by Jobstart), relevant vocational training (which was offered by Jobskills), and ongoing personal support (which is offered by Intensive Assistance providers)'.³⁹

Feedback from participants in an independent study of WFTD revealed that: 'The large majority of participants had not only experienced paid employment, but many had kept a job for twelve months or more in the past. This calls into question the program's objective of creating a work culture and teaching basic work habits'.⁴⁰ After completion of the program, 80% of participants were still unemployed five months later.

Other data recently released on WFTD's employment outcomes indicated that:

... only 27% of former participants were in employment 3 months later. This rises to 33% if those who moved on to other employment schemes (such as Job network services) are excluded from the figures. However, this is still a poor outcome, compared with former 'Working Nation' labour market programs that also provided paid employment experience: Jobstart (59%) and Jobskills (41%), and Intensive Assistance provided through the Job Network (36% in 1999-2000).⁴¹

An ACOSS analysis of the WFTD scheme has suggested that the 'main reason its poor outcomes is that ... [it] was not designed in the first place to help people into employment'.⁴² It suggests that rather than continuing to fund WFTD the government deploy more funds to Intensive Assistance through the Job Network to 'organise more substantial paid employment experience in mainstream jobs (both with and without formal training) for those who need it. After all, the ultimate goal is to get people working for wages, not working for the dole'.⁴³

The compulsion for the unemployed to work or fulfil some equivalent activity on the grounds of their obligations to the taxpayers is also questionable given that most income support recipients have been regular income taxpayers at some stage or may be in the future and already pay a range of other taxes such as the goods and services tax. The notion of the ability to pay tax as the defining aspect of community membership is highly reductive in any case, as it suggests a certain priority or status for economic participation over other forms of contribution to the community.

The application of this 'non-discriminatory and egalitarian' concept of the citizen to extend self-reliance and active citizenship to all social groups – that is, the

38 Kinnear notes that one response from the welfare sector to the Government's application of mutual obligation policy has been that 'it is unacceptable to compel unemployed people to undertake activities that cannot be demonstrated to enhance their long-term position'. Kinnear, P, *op.cit*, p7.

39 ACOSS, 'Does Work for the Dole lead to work for wages? ACOSS analysis' (November 2000) ACOSS Info 223 www.acoss.org.au/info/2000/info223.htm (23 December 2001), p1.

40 Kinnear, P, *op.cit*, p7. The independent study was Sawyer, H, 'One fundamental social value: Participants' views on Work for the Dole', RMIT, Melbourne, 2000.

41 ACOSS, 'Does Work for the Dole lead to work for wages?', *op.cit*, p1. ACOSS's analysis was based on data from DEWR/SB, 'Work for the Dole net impact study', August 2000, and DEWR/SB, 'Labour market assistance outcomes', June quarter 2000 (September 2000).

42 *ibid*.

43 *ibid*.



expectation of active participation in mutual obligation of all adult individuals, including women, Indigenous and disabled peoples – has the potential to increase the injustices and inequities experienced by the disadvantaged, as illustrated by the impact of breaching.⁴⁴ Kinnear notes that:

As a general principle, the idea that members of society should cooperate to secure the mutual advantage of all is reasonable, compelling and vital to social justice. But to single out certain groups, especially disadvantaged groups, for special and mandatory obligations is a distortion of this principle, especially in circumstances where the disadvantaged groups have limited or no choice.⁴⁵

The lack of employment opportunities available for certain groups means that these policies are likely to be harsher in their impact on them than on other sections of society.⁴⁶ Fincher and Saunders highlight the impact of locational disadvantage:

The types of citizen our governments, media, even educational institutions celebrate as successes are: hard-working, in paid employment, entrepreneurial, efficient, so that they are self-funding and self-helping and not drawing from the public payroll for pensions or allowances. The types of locations that benefit (though only implicitly as Australian governments exhibit limited regional or spatial thinking and planning) are those that are the places of work and residence of those citizens. These locations are primarily metropolitan... Paid employment is apparently to be ever more synonymous with citizenship in Australia.⁴⁷

Other significant factors contributing to increasing poverty and inequality – and this is highly significant for Indigenous Australians – include lack of education and employment skills, and family history of unemployment or precarious employment. Peter Travis argues that lack of employability is a more significant indicator of poverty than low income:

In principle, low income can be easily remedied. The combination of low skills and low participation in either education or the labour market is far more

44 See discussion in Yeatman, *op.cit.*, pp 258-9. Following Budget 2001, mutual obligation requirements for parenting payment recipients were introduced and are to be implemented over a two-year period. Mature Age and Partner Allowances are to be encouraged to transfer to Newstart, and from July 2003 there will be no further grants of these Allowances. Requirements to undertake an approved activity or WFTD have been extended to 39 year olds, and those between 40 and 49 will be required to complete specific amounts of study, part-time or community work or a mutual obligation activity.

45 Kinnear, P, *op.cit.*, p19. The tendency of 'breaching' to penalise disadvantaged sections of the population, such as Indigenous people and youth, is an example of the discriminatory effects of this policy emphasis.

46 Peter Saunders notes the findings of a survey conducted in 2000 on community attitudes to social change and social policy indicated that: 'While a large majority favoured requiring the young employed and, to a lesser degree, the long-term unemployed, to do just about anything as a condition of getting benefit ... [t]here was much greater reluctance to impose activity test requirements on the older unemployed and those with young children, and strong opposition when it comes to people affected by a disability.' Saunders, P, *op.cit.*, p3.

47 Fincher, R, and Saunders, P, 'The complex contexts of Australian inequality', in Fincher, R, and Saunders, P, (eds), *Creating unequal futures: Rethinking poverty, inequality and disadvantage*, Allen and Unwin, Crows Nest, NSW, p33.



difficult to alter. This is the basis for the concern that leads commentators to use terms like “marginalisation” or “social exclusion”.⁴⁸

The focus of government employment policy at the level of the individual ignores the need for, or possibility of, systemic change including attention to structural inequalities that might generate more employment opportunities. The emphasis on tackling welfare dependency can also serve to obscure the impact of these issues:

If Australia faces a “crisis” of increasing numbers of individuals who are trapped in cycles of demoralised welfare dependency, this may justify a hard-line response of conditional benefits and mandatory individual mobilisation. If, on the other hand, the problem is one of increasing inequality, structural poverty and entrenched disadvantage then the solutions should focus on the reduction of inequality and the redistribution of wealth.⁴⁹

As *Uniting Care*'s report on poverty observes, ‘not only does work not necessarily lift people out of poverty but there are also not enough jobs for all those who are looking for work’.⁵⁰ A comparison of the number of unemployed persons and duration of unemployment against job vacancies Australia-wide indicated that ‘even in a perfect labour market where skills exactly matched job vacancies, there would still be more than 6 unemployed people for every job available’.⁵¹

Mutual obligation, practical reconciliation and Indigenous welfare reform

Since 1996 the introduction of a mutual obligation approach to welfare reform has been accompanied by a shift in the basis of Indigenous policy making in general to what has subsequently been termed ‘practical reconciliation’. The introductory chapter gave some discussion of the practical reconciliation approach and a more detailed examination is provided in Chapter 6 of this report.⁵² Practical reconciliation focuses on countering issues relating to Indigenous disadvantage in the areas of education, health, housing, and employment as opposed to other issues which are said not to lead to concrete change and therefore to be ‘symbolic’.

Practical reconciliation and mutual obligation fit hand in glove. In the most recent budget statement, *Our path together*, the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs describes the Government’s approach as focused on ‘practical measures aimed at increasing self reliance, breaking the cycle of welfare dependency and improving the health of Aboriginal and Torres Strait Islander people’.⁵³ Previous budget statements have similarly noted, for example, the commitment of the Government to assisting ‘more indigenous people to break

48 Travers, P, ‘Inequality and the futures of our children’, in Fincher, R, and Saunders, P, *op.cit.*, p121.

49 Kinnear, P, *op.cit.*, p34.

50 Leveratt, M. *The Other Centenary: One Hundred Years of Poverty Lines and Inequality*, *Uniting Care* Victoria, June 2001, p8.

51 *ibid.*

52 See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, HREOC, Sydney, 2000, pp2-7; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC, Sydney, 2000, Chapter 2.

53 Ruddock, the Hon P, ‘Our path together’, *media release*, 22 May 2001.



away from welfare dependency and in return [improve] their social circumstances in areas like employment, housing, health and the criminal justice system'.⁵⁴

But while mutual obligation can be seen as integral to the process of practical reconciliation, to date there has been very little focus on the Indigenous-specific dimensions of welfare dependency in debates about general welfare reform and mutual obligation.

This has been one of the main criticisms directed towards the McClure Report and the government's response to it, by a range of Indigenous and non-Indigenous commentators. Both the McClure Report and the government response have been seen as providing a limited, tokenistic consideration of the specific issues facing Indigenous people caught in the welfare system.⁵⁵ This is despite the extent of Indigenous contact with the income support system, and with Indigenous people being unemployed at over two and a half times the rate of the general population.⁵⁶ This figure is significantly higher if Indigenous participants in CDEP schemes are counted as unemployed.

The McClure Report emphasised that given the level of Indigenous disadvantage, systemic discrimination by business towards Indigenous people needs to be addressed and further strategies for private sector employment developed. In addition to targeting assistance to individuals, it suggested the establishment of local job creation schemes, local and regional development initiatives, small business development assistance and group enterprise development assistance.⁵⁷ The McClure Report cited the Gwydir Valley Indigenous Employment Strategy as an example of a 'successful collaboration of Commonwealth and local governments, industry associations and local businesses'.⁵⁸

The McClure Report has been criticised for its lack of consideration of some of the contextual factors affecting Indigenous employment status, such as the limited employment and regional development prospects in certain rural and remote areas.⁵⁹ It does not give any detailed discussion of issues concerning the cultural appropriateness for Indigenous people of the emphasis on individualised service delivery central to the report's proposed participation support system.

The key emphasis of the government's policy approach to Indigenous employment and welfare issues is on increasing Indigenous participation in the formal economy, especially within the private sector. Government policy seeks to achieve this largely through the Indigenous Employment Policy (IEP) and the Community Development Employment Projects (CDEP) Scheme.

54 Herron, the Hon J, 'Removing the welfare shackles', *media release*, 18 March 1998; 'Removing the welfare shackles: A discussion paper on a reform initiative for Indigenous economic development', www.atsia.gov.au/content/shackles.html (13 June 2001).

55 For discussion, see ATSIC, 'Welfare reform: a brief history' (Autumn 2001) *ATSIC News*, p5, and Altman, J, "'Mutual obligation", the CDEP scheme, and development: Prospects in remote Australia', in Morphy, F, and Sanders, W, (eds), *op.cit.*, pp125-34.

56 Australian Bureau of Statistics, 'Labour force characteristics of Aboriginal and Torres Strait Islander Australians: Occasional paper', (2000) ABS Canberra. In February 2000, the Indigenous unemployment rate was 17.6% compared to 7.3% for non-Indigenous people. This does not include those people who are not actively seeking employment or people on CDEP.

57 McClure, P, *op.cit.*, p38.

58 *ibid.*, p48.

59 Altman, J, *op.cit.*, pp128-30.



The Indigenous Employment Policy is the centre-piece of this approach. It commenced on 1 July 1999 and consists of three elements, namely the Indigenous Employment Programme, Indigenous Small Business Fund and a package of measures to improve outcomes from mainstream programs (such as Job Network and Work for the Dole).

The Indigenous Employment Programme includes: Wage Assistance, an incentive to help Indigenous job seekers find long-term employment by giving credit breaks to employers; bonuses for CDEP participants placed in outside employment for at least 20 hours a week; a project to place more Indigenous Australians in the private sector; structured training and employment projects; a foundation to utilise voluntary service to Indigenous communities; and a national Indigenous cadetship program.

The Indigenous Small Business Fund was established to support the development of Indigenous businesses and enterprises. It seeks to improve Indigenous access to business preparation and support through providing business management programs, and through skills development programs such as mentoring, networking, advisory services and market development. Individuals can also apply for assistance to develop a business plan. It is jointly funded through contributions over a three-year period of \$6 million from the Office of Small Business of the Department of Employment, Workplace Relations and Small Business and \$5 million from ATSIC.

The third aspect of the Indigenous Employment Policy instigates measures to improve the accessibility of mainstream programs, particularly Job Network. Areas targeted for improvement included coverage by Job Network catchment areas; the establishment of Indigenous employment specialists; and requirements for job providers to include Indigenous service strategies.

The Commonwealth Grants Commission's *Report on Indigenous Funding 2001* commented positively on the employment outcomes achieved under the Indigenous Employment Program – a 'significant proportion of IEP assistance is being delivered to remote regions, and the employment outcomes being achieved under IEP seem to be good relative to outcomes for Indigenous people from mainstream assistance programs'.⁶⁰ However, it found that Job Network was not widely accepted in the Indigenous community, that it had varying levels of accessibility, especially in remote regions, and that poor employment outcomes continued despite a more equitable rate of commencements in Intensive Assistance (one of its employment services). Evaluation of Job Network Stage One indicated that Indigenous job seekers 'were concerned about the quality and type of assistance being delivered'.⁶¹

Indigenous Business Australia (IBA) was recently established through the *Aboriginal and Torres Strait Islander Commission Amendment Bill 2000* to expand the functions of the Aboriginal and Torres Strait Islander Commercial Development Corporation (CDC). It seeks to refocus business client expectations on commercial

60 Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Commonwealth of Australia, Canberra, 2001, p254.

61 *ibid.*



objectives; enable ATSIC to outsource its commercial services; encourage a shift in the culture surrounding Indigenous business support; and appoint a full-time chairperson to enable IBA to expand, particularly in its pursuit of joint venture arrangements.

The Community Development Employment Projects (CDEP) Scheme is also central to the government's approach. The CDEP Scheme has been in operation since 1977. It enables local Aboriginal organizations to provide employment and training as an alternative to unemployment benefits. CDEP participants forgo their rights to social security entitlements and receive wages from CDEP organisations at a similar level to benefits in return for part-time work. A CDEP grant to an organisation also provides on costs funds for the administration of projects and the purchase of materials, equipment and services. The CDEP Scheme operates in a diversity of contexts across Indigenous Australia, and provides a base for training, skills and enterprise development, as well as contributing to other economic, social and cultural outcomes in communities. The Scheme is led by the communities and participants involved, and any activity that benefits the community can be a CDEP activity. There are currently over 300 Indigenous community-based organisations and over 30,000 Indigenous people, about one-third of all Indigenous people in employment, participating in the CDEP Scheme.⁶²

One of the advantages of the CDEP program is that it has evolved and adapted in response to the uniqueness of Indigenous labour force circumstances, and has significant social, economic and cultural benefits such as supporting traditional aspects of community life, and contributing to social cohesion and the viability of communities in remote areas.

The CDEP Scheme has a significant place in the history of struggle for Indigenous rights. The Scheme was initiated at Bamylli in the mid-70s as a negotiated alternative to 'sit-down' money in response to problems experienced by communities as a result of introducing cash incomes through the social security system. Although discriminatory references to Aboriginal people were removed from social security legislation in 1966, full access to social security benefits did not occur for Indigenous people until the late 1970s and in some remote communities, not until the early 1980s. The CDEP Scheme was thus a very progressive development in so far as it enabled Indigenous access to the social security system but sought to give some protection to economic, social and cultural rights by making adaptations to that system.

The CDEP Scheme has inevitably been compared with the Work for the Dole program. It has received renewed attention in light of current debates about Indigenous people and welfare passivity. Noel Pearson, for example, has

62 For an overview of the issues surrounding CDEP, see Race Discrimination Commissioner, *The CDEP Scheme and racial discrimination: A report by the Race Discrimination Commissioner*, Commonwealth of Australia, Canberra, 1997, pp1-23; Morphy, F, and Sanders, W, *op.cit*; and Spicer, I, *Independent review of the Community Development Projects (CDEP) Scheme*, Office of Public Affairs, ATSIC, Canberra, 1997.



commented on the CDEP Scheme as a moderately successful example of the application of the 'reciprocity' principle.⁶³

The Scheme's evolution as an adaptation to the employment circumstances and labour market realities of Indigenous Australians in the post-1967 'rights' era has made it difficult to define. It has been variously described as an employment program, a form of income and a form of welfare benefits, a source of training or skilling, community development, a transition to employment in the mainstream labour market, a substitute provider of essential services, a source of community cohesion and cultural maintenance, an Indigenous initiative and even a form of self-determination.

While the CDEP Scheme has experienced continued popularity – there have always been more wanting to join the Scheme than can be accommodated – it has had its share of detractors as well as supporters. Issues of equity with the non-Indigenous workforce and possible discrimination on the basis of race have been major sources of contention.

In 1997, the federal Race Discrimination Commissioner released a report examining the Scheme, *The CDEP and Racial Discrimination*. The report found that while the CDEP Scheme is race-based in that it applies only to Aboriginal and Torres Strait Islander peoples, it is designed to deal with the disadvantage experienced by Indigenous communities in their access to social security and mainstream labour market programs and opportunities. Moreover, it seeks to do so in ways that enhance the economic, social and cultural rights of Indigenous peoples. As such it was seen as being adapted to the concrete circumstances of Indigenous communities, for example, in overcoming difficulties faced by those in remote locations, and therefore not discriminatory. The CDEP Scheme was also found not to be racially discriminatory in so far as it does not disadvantage non-Indigenous people.

The Report had some specific concerns, however, about the administration of the Scheme. Much of these related to the lack of consistency by Commonwealth agencies in the treatment of income derived from the CDEP Scheme. Serious inequities were caused by the definition of CDEP as a Commonwealth-funded program under the Social Security Act, which barred CDEP participants from becoming DSS customers and receiving the same services and allowances. The Scheme was also inconsistent in its treatment of pensioners. Following the findings of this Report and also those of ATSI's independent review of the CDEP Scheme, changes were introduced to address these inequities in the *Further 1998 Budget Legislation Amendment (Social Security) Bill 1999* that came into effect in March 2000.

Further changes were announced in the 2001-02 Budget to align the CDEP scheme more closely with the Indigenous Employment Policy. \$48 million, including new funding of \$31 million, was allocated to CDEP organisations to take on the role of

63 Although he makes the further proviso that CDEP be 'fixed up' by 'reinsert[ing] the original goals of reciprocity and responsibility into this resource'. Pearson, N, *Our right to take responsibility – discussion paper*, Cape York Land Council, Cape York Peninsula, June 1999, p67.



Indigenous Employment Centres and assist 'up to 10,000 participants make the transition from CDEP work experience into paid employment'. This is to be achieved through the coordination of work experience, job search support and access to training to CDEP participants, and through support and mentoring assistance to Indigenous job seekers outside CDEP.⁶⁴ This funding is to commence in February 2002 and it is envisaged that it will apply in cities and regional centres where there are greater employment opportunities.

This new funding partly responds to concerns expressed by ATSIC that the expectations over recent years that CDEP schemes will give priority to the development of business enterprises and related employment, and also to expanding the number of participants who move into employment outside the Scheme, has placed greater pressure on CDEP without providing appropriate support. This is because these expectations require:

... greater liaison with the State, Territory and Commonwealth government Departments and agencies with employment, training and business support responsibilities. Some agencies, especially Centrelink, have contracted their service delivery to private contractors, with a reduction along the way of the previous capacity to deliver services in remote areas. Changes in status of CDEP participants between unemployment, CDEP employment, participation in training, and employment outside CDEP also have involved an enormous expansion of form-filling, liaison and detailed record keeping by CDEP administrators, on behalf of participants and the government agencies.

In summary, the demands on the CDEP administration staff in community organisations have become overwhelming, and nearly all of the projects have suffered at some time, particularly in the planning of work programs around community development objectives determined by participants, and in prompting staff turnover.⁶⁵

ATSIC contrasts this pressure with the development over the past two years of the WFTD Scheme for unemployed people in the general community:

Although it draws on unemployed people in established urban areas where costs are much lower, the allowance for operating costs ("on costs") of projects is, on average, 25% greater than is provided under the CDEP Scheme funding. This comparison confirms that the pressures on CDEP staff are the result of serious under-resourcing, particularly when the difficulties of operating in the remote and rural locations of most CDEPs are taken into account. It is the situation which Indigenous critics of government funding describe as "setting it up to fail".⁶⁶

64 Vanstone, the Hon A, and Abbott, the Hon T, 'Our path together: Support for CDEP Participants to get a job', *Australians working together – Helping people to move forward, Fact Sheet 6*, Commonwealth of Australia, Canberra, 2001, p1. Other funding was allocated to improve Indigenous access to mainstream services, such as through additional funding of \$9 million to improve Centrelink's remote area servicing strategy; \$10 million for increased education and training assistance; as well as \$32 million for improved assessment for Indigenous and eligible job seekers; and access to Training Credits of up to \$800 per participant in Job Search Training and Intensive Assistance.

65 Aboriginal and Torres Strait Islander Commission, *Directions for change – Aboriginal and Torres Strait Islander 2001/02 Budget outlook*, ATSIC, Canberra, 2001, pp8-9.

66 *ibid.*



Inequities still remain between the level of operational funding support provided for CDEP and that provided for the Work for the Dole program, despite a review by the Department of Finance and Administration and support from ATSIIC and a Department of Prime Minister and Cabinet recommendation of a \$300 per participant increase for training and work initiatives within CDEP. Such an increase in operational funding would 'ensure appropriate supervision and the achievement of even greater training, employment and community development outcomes' and without it, 'CDEP organizations will continue to struggle to provide adequate supervision to CDEP workers and to ensure adherence to occupational health and safety standards'.⁶⁷

The failure to provide additional operational funding to CDEPs means that, in the words of the ATSIIC Chair, the Scheme 'remains the poor cousin of the mainstream work for the dole program despite being the voluntary forerunner and setting the scene for the principles of mutual obligation and community participation'.⁶⁸

For remote communities with fewer job opportunities, the 2001-02 Budget allocated \$32 million from July 2001 for Community Participation Agreements. These are to be trialled in approximately 100 communities with arrangements whereby they design and negotiate their obligations and activities in return for income support, and plan for better delivery of services at the local level. The Agreements are to increase social capital by providing:

... a way [for income support recipients] to make a practical, positive contribution to their families and communities.... [to] give communities a way to involve everyone in community life, help them identify the services they need most and give them the support to access them.... [to] support activities such as leadership, strengthening culture and community governance.⁶⁹

The initiative was developed in response to the McClure Report's lack of extensive treatment of Indigenous welfare reform issues. Despite its exclusion from the interdepartmental process on welfare reform, ATSIIC approached the government with a proposal for Community Participation Agreements in remote communities which formed the basis for this initiative. The modelling currently taking place with the Mutitjulu Community as a prototype for the implementation of the CPA initiative in remote communities will be discussed further in Chapter 3.

Mutual obligation, welfare reform and practical reconciliation – Indigenous-specific concerns

In addition to the general concerns raised above about the mutual obligation approach, there are a range of other concerns that relate to the specific circumstances of Indigenous people and to which attention must be devoted in any attempt to reform welfare or increase the economic participation of Indigenous people.

67 Whitby, T, (Commissioner), 'Changes to CDEP', ATSIIC – Budget response', *media release*, 22 May 2001, p1.

68 Clark, G, (Chair), '2001 Budget – A mixed bag', *media release*, 22 May 2001.

69 Vanstone, the Hon A, and Abbott, the Hon T, 'A fair deal for Indigenous Australians', *Australians working together – Helping people to move forward, Fact Sheet 2*, pp1,2.



These concerns do not relate to the applicability of the mutual obligation approach *per se* to Indigenous people. As *Social Justice Report 1999* observed:

The concept of mutual obligation is, of course, not alien to Indigenous peoples. Many Indigenous people argue that it is a concept that is fundamental to Indigenous social and cultural values. Indigenous people do not, for example, see themselves as “users” of land. They are related to and part of the land, with custodial obligations to nurture and protect it.⁷⁰

Instead, the concerns relate to the extent to which the mutual obligation approach underpins current government policy approaches to Indigenous welfare reform and economic independence to the exclusion of initiatives to address the broader context of Indigenous marginalisation.

The combination of the rhetoric of mutual obligation, focused on self-reliance and responsibility, and practical reconciliation, emphasising practical and real outcomes in priority areas, is a powerful one. Both approaches share a number of common features.

Both mutual obligation and practical reconciliation see the main interaction in society as an individualised one, which is State-centred and focuses on the obligations of the individual to the State and vice versa. The coerciveness with which these obligations are imposed can act as a replacement bureaucratic and punitive form of control of Indigenous people and their engagement in the mainstream society.

Mutual obligation and practical reconciliation are also emotive at a very simplistic level, particularly in the language that is used to explain them. Mutual obligation, for example, uses populist rhetoric such as ‘pulling together’, ‘having a go’, and ‘a hand up not a hand out’⁷¹ to focus attention on the perceived deficiencies of the individual. As *Uniting Care* explain:

For all the use of warm and fuzzy words like ‘participation’ and ‘inclusion’, a clear division is being drawn in society which depicts the ‘poor’ as less than fully human. Such a division is exacerbated by a redefinition of citizenship – which rests not on a series of rights and entitlements in an egalitarian state but, rather, upon the individual’s responsibility to make good her or his incapacities or failures.⁷²

Mutual obligation encourages a picture of ‘irresponsible’ people failing to meet their duties to society despite the support and commitment shown to them. Practical reconciliation similarly creates a picture of the Government as concerned about achieving concrete outcomes in areas such as health and education, as opposed to addressing symbolic measures with the implication that the latter are irrelevant to improving the day to day livelihoods of Indigenous people. It seeks to discredit and close down debate about issues that do not fit within this framework, such as a formal apology or a treaty, even where they are perceived by Indigenous people to be of central importance to their advancement.

70 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, *op.cit.*, p3.

71 See further: Howard, the Hon J, *op.cit.*, and ‘Transcript of the Prime Minister the Hon John Howard MP, Menzies Lecture Series, Perspectives on Aboriginal and Torres Strait Islander Issues’, *Speech*, 13 December 2000.

72 Leveratt, M, *op.cit.*, p7.



The language of mutual obligation and practical reconciliation is a significant concern when considered in the context of the adequacy of the overall commitment of government to addressing the socio-economic marginalisation of Indigenous people, which shall be discussed later in this section.

Both mutual obligation and practical reconciliation are also ahistorical. They are firmly grounded in the present circumstances of the individual and give little attention to the causal factors, or underlying issues as the Royal Commission into Aboriginal Deaths in Custody described them, of Indigenous disadvantage. As stated in the introduction, they strip Indigenous disadvantage of its historical context and admit no contemporary, ongoing consequences. Consequently, nothing is seen to be particularly distinctive about Indigenous disadvantage or the necessary response to it.

The context of Indigenous marginalisation

Current Indigenous employment and welfare policy responds to the situation of Indigenous people by striving for equality of participation in the formal economy and through increasing 'self-reliance' through greater economic participation. Promoting such participation is quite obviously necessary and measures to facilitate this in a culturally appropriate manner (be it through the specific focus of mainstream programs and agencies on greater accessibility or through specifically targeted measures) are to be welcomed.

But such an approach is limited. It does not acknowledge the broader fabric of social and economic factors that contribute to the level of Indigenous disadvantage and economic marginalisation such as dispossession, systemic racism,⁷³ structural inequality and social marginalisation.

Colonising processes have left a range of effects on Indigenous populations that are inter-related and continue to contribute to the current context of Indigenous disadvantage.⁷⁴ These include intergenerational poverty, welfare dependency, over-representation in the justice system, substance abuse, family and societal disintegration, spiritual and cultural dislocation, and environmental damage. The level of control exercised by the State over many aspects of the lives of Indigenous people has been central to the creation of this context of disadvantage.

In addition, other factors – historical, demographic, geographic and cultural – make improvements to Indigenous employability and economic participation difficult to facilitate. These factors include poor health, low educational levels of Indigenous people (which is of increasing concern with the rapid technological change in the labour market), over-crowding of living conditions and low self-esteem.

73 ABS and CAEPR research found that: 'There is a statistically significant negative effect of Aboriginality on the probability of employment. Most of the difference in the employment probabilities between Aborigines and non-Aborigines cannot be explained by the standard human capital variables but rather by factors associated with Aboriginality'. ABS and CAEPR, *National Aboriginal and Torres Strait Survey: Employment outcomes for Indigenous Australians*, ABS Cat. No. 4199.0, ABS, Canberra, 1996.

74 See summary of reasons for Indigenous disadvantage in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit.*, pp9-10.



Urging self-reliance for many Indigenous people in this context, without acknowledging or adequately addressing these underlying factors, is fanciful. When combined with punitive, coercive measures it is potentially vindictive. It is highly probable that it will also result in the opposite of the intended effect – rather than inspiring people to raise themselves out of a position of extreme marginalisation, it can in fact further demoralise them especially if support is inadequate.

These factors are compounded in regional and remote areas for reasons often relating to 'locational disadvantage',⁷⁵ such as the lack of business development and employment opportunities, but also the embeddedness of government service provision and activity in community organizations; embeddedness of individuals in wider social networks not contingent on economic participation; and divisions within communities for historical, cultural or political reasons.⁷⁶ Poor resource endowments and market linkage associated with 'remoteness' are also reasons for underdevelopment, with the development opportunities provided by major mineral deposits and the opportunities for tourist and cultural industries being exceptions in some remote areas.⁷⁷ The requirement to undertake certain mutual obligation activities can also be problematic, due to distances to be travelled, and lack of appropriate work activities.

As a consequence, the mutual obligation approach over-stretches itself in its application to Indigenous welfare reform by assuming that 'the intensity and scale of ... personal and social problems, wrongly attributed to welfare dependency, can be addressed through mechanisms which both enable, and ultimately compel, individuals to engage with the formal economy'.⁷⁸

The experience of the CDEP Scheme to date suggests that this is unlikely, with the Scheme predominating in areas where economic opportunities are most limited rather than providing a lever for economic transformation.⁷⁹ Notably, however, the recent report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs on the situation of urban-dwelling Aboriginals urges greater funding for CDEP placements in urban areas on the basis that CDEP is able to provide greater opportunities for advancement, work training and employment than mainstream programs.⁸⁰

Accordingly, 'welfare reform must be accompanied by labour market reform in mainstream Australia and [that is] why significant progress for indigenous Australians will not be achieved without sweeping economic reform'.⁸¹

75 See Fincher, R, and Saunders, P, *op.cit*, p20ff for discussion of the spatial concentration of disadvantaged in Australia.

76 See Martin, D, *op.cit*, p34 and Altman, J, *op.cit*, p128-9. Altman is writing in relationship to the prospects of establishing relationships between government, the business, the community and relationships apropos the McClure Report.

77 Altman, J, *ibid*, p129-32.

78 Martin, D, *op.cit*, p34.

79 Altman, J, *op.cit*, p126.

80 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *We can do it!: The needs of urban dwelling Aboriginal and Torres Strait Islander peoples*, Parliament of Australia, Canberra, 2001, paras 7.28-7.32.

81 Saunders, P, *op.cit*, p27.



A comparison of the current approach to the findings and recommendations of the 1985 *Report of the Committee of Review of Aboriginal Employment and Training Programs* (the Miller Report)⁸² indicates the extent to which a more holistic approach to Indigenous employment and welfare reform has been eroded in the past 15 years.

The Miller Report undertook to assess the effectiveness of the 1977 National Employment Strategy for Aboriginals (NESA) in addressing employment equity between Indigenous and non-Indigenous populations. The Report concluded that 'the Strategy can be said to have had only marginal impact on the overall Aboriginal employment situation', with levels of Indigenous unemployment and economic dependence remaining high, and that the causes for this lay in 'the social and structural problems faced by Aboriginal people in providing for their livelihood'.⁸³

It also emphasised that adequate treatment of these issues was beyond the scope of an Indigenous employment and training strategy, as they concerned 'access to and control of land and other resources, local government arrangements for Aboriginal towns, relationships with other forms of local government, access to development capital and involvement in particular industries'.⁸⁴ The Report urges:

... the government to adopt a policy of support to Aboriginal people which goes beyond the welfare, housing and municipal services industries and which should be directed towards Aboriginal people becoming more independent by enabling them to provide for their own livelihood. Programs to achieve this will be longer-term, involve real training and result in Aboriginal control of resources, as well as access to jobs in the regular labour market.⁸⁵

By contrast, the current policy approach to welfare reform runs the risk of collapsing the complex issues surrounding Indigenous disadvantage into the category of 'welfare dependency' and of keeping the focus firmly on the individual recipient rather than the broader aspirations of Indigenous peoples. As I noted above, the language of mutual obligation, and to a lesser extent practical reconciliation, is a blaming language which sets up assumptions about the individual recipient.

This absolves the various levels of government from their responsibility to facilitate the circumstances for greater Indigenous participation, such as genuine economic reform, and in some instances to provide basic citizenship entitlements such as functional municipal services and infrastructure for communities.

The CDEP Scheme, for example, has a history of supplying essential services to some communities (such as health services, child-care services, housing and infrastructure construction, garbage collection, community maintenance), sometimes becoming the entry point for government, especially in remote areas. Indeed, 'in remote communities, CDEP is often the only institution; it represents governance. As the Spicer review said, 'Without it, some remote communities would simply not exist'.⁸⁶ The CDEP fills gaps in government service delivery by providing

82 Miller, M, (Chair), *Report of the Committee of Review of Aboriginal Employment and Training Programs*, Australian Government Publishing Service, Canberra, 1985.

83 *ibid*, p5.

84 *ibid*, p9.

85 *ibid*, p10.

86 Spicer, I, *op.cit*, p4.



specific employment, training and community development initiatives for Indigenous people.

The focus of mutual obligation on the individual's responsibilities also shifts the focus away from the adequacy of the measures adopted by government to address the broader context of Indigenous marginalisation.

To date each of the Social Justice Reports have emphasised the importance of ensuring governmental accountability for the outcomes of service delivery to Indigenous people. As last year's report noted, we must ask whether enough is being done to overcome the level of inequality faced by Indigenous people (that is, to close the gap) or whether we are merely doing enough to manage the inequality.

Assessing the impact of different forms of 'social cost' can play a significant role in developing a human rights approach to disadvantage. If the costs incurred by government attempts to address social problems (for example, through remedial programs) do not make significant inroads into the economic marginalisation of Indigenous people, then a government can be said to be merely managing the 'cost of the status quo' and the costs associated with the latter are likely to escalate. A long-term commitment to restructuring the relationship between Indigenous and non-Indigenous people through the provision of adequate resources would not only have better prospects for changing the circumstances of Indigenous people but may also 'lead to the progressive reduction and eventual elimination of the social costs accrued to Indigenous disadvantage'.⁸⁷

CAEPR has made estimates concerning the social cost of achieving parity between Indigenous and other Australians in the workforce. These indicate that if Indigenous unemployment was made commensurate with that of the rest of the population, there would be major savings to government in payments to the unemployed, increases to tax revenue and national production, as well as improvements in areas such as Indigenous health.⁸⁸ They warn that if significant action is not taken soon to address Indigenous employment status, the current situation is likely to deteriorate further due to the relatively high Indigenous population growth and the 'difficulties of economic catch-up in a rapidly changing and increasingly skills-based labour market'.⁸⁹

A relevant example of managing rather than overcoming Indigenous disadvantage is the continuing over-reliance on the CDEP Scheme. At various times, the CDEP Scheme has been criticised on the grounds that it runs the risk of becoming a 'lifetime destination' for the Indigenous unemployed rather than a 'conduit to other employment options'⁹⁰ and that it is 'a second-rate labour market created by

87 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit.*, p26. In the Canadian context, the Commissioners for the Report of the Royal Commission on Aboriginal Peoples proposed that the application of substantial resources by Government over a twenty-year cycle was necessary to restructure the relationship between Indigenous and non-Indigenous peoples. See Royal Commission into Aboriginal Peoples, *Volume 5: Renewal: A twenty year commitment*, Minister of Supply and Services, Ottawa, 1996, pp23-24.

88 Hunter, B, and Taylor, J, *The job still ahead – Economic costs of continuing Indigenous employment disparity*, ATSIC, Canberra, 1998, Executive summary.

89 *ibid.*

90 Spicer, I, *op.cit.*, p4.



government that traps people into low-paid and part-time work and protects them from the rigours of the reallabour market'.⁹¹ These considerations have no doubt motivated the government into introducing, through the Indigenous Employment Strategy, bonuses for moving people off CDEP into paid employment.

The CDEP Scheme's lack of a prescribed time-frame and long-term employment goals implies that it exists to support a problem perceived as intractable or maybe just not worthy of significant commitment to redress. However, recent estimates indicate that the younger age structure of the Indigenous population may lead to greater employment need as the Indigenous population aged 15 years and over is expected to grow at 2 % per annum over the decade from 1996, compared to 1 % for the rest of the population. As a consequence it has been estimated that in the first decade of twenty-first century, the costs to government of low income disparity are estimated to grow significantly and 'maintenance of employment levels at current unacceptably low levels will remain dependent on continued expansion of the CDEP Scheme'.⁹²

These factors indicate that government expenditure on Indigenous employment is still relatively low in comparison to need. They also draw attention to the inadequacy of the CDEP Scheme as a special measure in the face of levels of Indigenous employment need and inequality that continue to escalate. Funding shortfalls for health, housing and infrastructure against estimates of Indigenous need further compounds this situation. These are areas that impact on the well-being and employability of Indigenous people, a point emphasised by the recent *Health is life* report.⁹³

A further concern is that the language of the mutual obligation approach can potentially promote intolerance among the wider society. In the case of Indigenous policy, such intolerance also exists on a broader scale with common myths about Indigenous people receiving special benefits through the level of government expenditure on Indigenous disadvantage. The rhetoric of mutual obligation can effectively operate to transfer community dissatisfaction at the level of outcomes achieved by government to the Indigenous population itself. This is a highly undesirable outcome, which can undermine broader community support for reconciliation, among other things.

The 'practical' focus on addressing welfare dependency through mutual obligation means that a range of inter-related factors – social, cultural, political and historical – integral to reversing Indigenous marginalisation are being consistently obscured from the social policy lens.

91 ATSIIC, 'More than Work for the Dole' (Autumn 2001) *ATSIIC News*, p 8.

92 Altman, J, 'The economic status of Indigenous Australians', CAEPR discussion paper no.193, CAEPR, ANU, Canberra, 2000, p16.

93 For example: 'A good education affects employment opportunities, which in turn impacts on income levels, access to good housing and health care. Poor health and poor quality housing, in the other hand affect school attendance, the ability to study and ultimately educational outcomes.' House of Representatives Standing Committee on Family and Community Affairs, *Health is life: Report on the inquiry into Indigenous health*, Commonwealth of Australia, Canberra, May 2000, p72. Shortfalls in Indigenous-specific funding will be discussed in Chapter 6.

Mutual obligation and Indigenous cultural values

The mutual obligation approach is often said to be appropriate for countering Indigenous welfare dependency on the basis that it is consistent with Indigenous cultural values such as reciprocity and an emphasis on community.

Noel Pearson has made the following comments about the effects of 'welfare poison' since 1967:

The irony of our newly won citizenship in 1967 was that after we became citizens with equal rights and the theoretical right to equal pay, we lost the meagre foothold that we had in the real economy and we became almost comprehensively dependent upon passive welfare for our livelihood... we find thirty years later that life in the safety net for three decades and two generations has produced a social disaster.⁹⁴

A consequence of this dependency on welfare has been that 'the responsibilities of individual citizens toward other citizens and their responsibility to contribute to the common good'⁹⁵ has been eroded in Aboriginal societies. Pearson advocates mechanisms for reinstating traditional values of 'reciprocity' in order to address the social breakdown and community dysfunction on the Cape York Peninsula on the basis that 'you need both rights and responsibilities to develop and participate in a successful society'.⁹⁶ He has also argued for the need for Indigenous communities to re-discover a sense of obligation or responsibility to other community members in the wake of a 'rights-based' welfare regime that has given way to passivity and a sense of entitlement.

Pearson recently described the effects of passive welfare on Aboriginal society as follows in the Perkins Memorial Oration:

Passive welfare has come to be the dominant influence on relationships, values and attitudes of our society in Cape York Peninsula. Indeed we are now at a stage where many of the traditions we purport to follow are too often merely self-deceptions (that we care for each other, that we respect our Elders, that we value our culture and traditions) and the 'traditions' which we do follow are in fact distortions conditioned by the pathological social situation which passive welfare has reduced us to: we sit around in a drinking circle because we are Aboriginal.⁹⁷

While Pearson advocates that Indigenous people need to exercise responsibility for their own self-determination, he also emphasises the responsibility of government:

Many people will take what I'm saying about the poison of passive welfare as a justification for their argument that the government should not be providing ear marked resources to Aboriginal people, but I do not support those ideas. It is the government's responsibility to coordinate and facilitate the solution of an urgent social crisis. It has the responsibility to facilitate

94 Pearson, N, 'The Light on the Hill', Ben Chifley Memorial Lecture, Bathurst Panthers Leagues Club, 12 August 2000, p6-7.

95 *ibid.*

96 Pearson, N, *Our right to take responsibility*, *op.cit.*, p22.

97 Pearson, N, 'On the human right to misery, mass incarceration and early death', Dr Charles Perkins Memorial Oration, McLaurin Hall, University of Sydney, 25 October 2001, p9.



our return to the real economy. However the government can only facilitate a solution, it cannot solve the problem. It also follows from what I have said that the government's responsibility is only transitory, or at least not indefinite.⁹⁸

Pearson's approach includes support for a substantial investment by government to the development of a regional interface between Indigenous organisations and communities on the Cape, and government departments and agencies and other stakeholders. Modelling based on this approach was outlined in Chapter 4 of last year's *Social Justice Report*.

Joseph Elu, the Chairman of Indigenous Business Australia, made a similar call in his Menzies lecture series speech in March 2001 for 'governments to stop sheltering communities and wrapping them up in cotton wool for "their own good"', and to move beyond subsidising Indigenous disadvantage with welfare payments. It is time, he stated, to 'open up debate about what is working and empower our communities to make choices about what is an appropriate program for our peoples'⁹⁹ with both government and the private sector. He pointed to the need to advance economic development by providing 'access to capital, on proper and equitable terms' to Indigenous communities, and to create an environment that encourages private sector involvement. He further suggested that governments and the private sector consider initiatives for establishing an economic base for Indigenous Australians such as: industry incentives; taxation incentives; creation of economic development zones; legislation for requirement of Indigenous involvement in the expenditure of government contracts; and compulsory community services for Australian financial institutions.¹⁰⁰

Pearson's approach has received wide support and been cited as an exemplary model of mutual obligation by both sides of politics.¹⁰¹ It has also played an integral role in the establishment of the Cape York Partnership plan between Indigenous communities of the Cape and the Queensland Government.¹⁰²

Pearson's comments have, however, to a large extent been appropriated by the government and policy makers and have been used to justify an approach to Indigenous policy making that is not based on the recognition of Indigenous rights. Indeed, his approach to reciprocity is regularly cited as support for the argument that rights in general are not 'practical' and do not contribute to improving the livelihoods of Indigenous peoples. For example, in an article in the *Age* published in July of this year, the federal Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs claimed that:

98 *ibid*, p12.

99 Elu, J, 'Indigenous economic empowerment: Fact or fiction', in *Perspective on Aboriginal and Torres Strait Islander policy*, Menzies Research Centre Ltd, Barton, ACT, July 2001, pp19-20.

100 *ibid*, p21.

101 See for example, Latham, the Hon M, 'Making welfare work', in Botsman, P, and Latham, M, (eds), *The enabling state: People before bureaucracy*, Pluto Press, Annandale, N.S.W., 2001, pp115-31 and Abbott, the Hon T, 'Mutual Obligation and the social fabric', Bert Kelly Lecture to the Centre for Independent Studies, 3 August 2000.

102 The Partnerships plan forms one response to the Queensland Government's Ten Year Partnership policy and Queensland Justice Agreement.



More Australians should listen to Cape York Aboriginal leader Noel Pearson... He has said that the organisations representing indigenous people have become so caught up in a rights agenda that they have forgotten the importance of taking responsibility for their own issues.¹⁰³

However, Pearson's argument is that: 'The substantial agreement has to be that the country is going to respect the rights of Aborigines to autonomy and self-determination and, in turn, it means that Aboriginal people will accept that they need to take responsibility for their own self-determination'.¹⁰⁴ He has recently stated that both sides of Australian politics 'continue to be half right in the policies that they are prepared to advocate', and that the 'Coalition will better understand the problems of responsibility but will be antipathetic and wrong in relation to the rights of Aboriginal people: they advocate further diminution of the native title property rights of Aboriginal Australians'.¹⁰⁵ As Patrick Dodson has explained, 'The Government wishes to drive a wedge between the concept of rights and welfare but also between those who advocate a rights agenda and those who seek relief from the appalling poverty'.¹⁰⁶

The misrepresentation of Pearson's insights by political commentators to suggest that the attainment of equal rights has led to welfare dependency and a social disaster in communities presents a false picture of efforts since 1967. It implies that first, a rights culture was fully implemented and second, it consequently failed and accordingly it should be abandoned.

Such a suggestion ignores the fact that the institution of equal rights at the formal level was 170 years late. The exclusion of Indigenous people from mainstream services was broader than an exclusion from welfare – it was also an exclusion from any form of participation in the formal economy or society through lack of access to education, health, housing and infrastructure of a comparable quality to that available to the rest of society.

There are a number of consequences of this history of exclusion. Fundamentally, removing barriers to access does not address the deeply entrenched marginalisation that has resulted. Many Indigenous people were left without the skills necessary to participate on an equal footing in the employment market. Low levels of education and a life experience that does not include employment has also had legacies for subsequent generations.

What this situation requires is the commitment to processes, accompanied by adequate resources, which allow Indigenous people to catch up rather than to seek to compete on the basis of what is clearly not a level playing field. There remains a lack of adequate commitment to this purpose.

In this context, a situation of welfare dependency is 'an inescapable conclusion... (and) is part of the historical legacy of the dispossession of Aboriginal people and their continuing exclusion from economic power structures rather than the

103 Ruddock, the Hon P, 'Aborigines reach a turning point: the public is coming round to practical reconciliation based on individual responsibility', *Age*, 23 July 2001, p15.

104 Cited in 'Reconciliation has to wait, says Pearson', *Koori mail*, 11 July 2001, p5.

105 Pearson, N, 'On the human right to misery, mass incarceration and early death', *op.cit.*, p1.

106 Dodson, P, 'Beyond the mourning gate – Dealing with unfinished business', Wentworth lecture 2000, Canberra, 12 May 2000, p14.



making of Aboriginal people themselves'.¹⁰⁷ As ATSIC have noted, access to welfare has 'unintentionally, and perhaps paradoxically, created poverty traps from which it is hard to escape'.¹⁰⁸

The Centre for Aboriginal Economic Policy Research has also argued that the rapidity with which Indigenous people have moved from a situation of exclusion from the mainstream economy to dependency on welfare by the beginning of the 1990s has been a major shift.¹⁰⁹ Clearly it is time to move beyond this. It requires acknowledgement, however, of the structural barriers of the past that remain of contemporary relevance.

What has fundamentally been lacking before and since 1967 is a rights culture that respects Indigenous people and provides them with the opportunity to participate on an equal footing in Australian society. The refusal to tolerate the discriminatory practices of exclusion from welfare, education and participation in the mainstream society and economy any longer was merely the first step on the road to a culture of rights and respect for Indigenous people. It is disingenuous to suggest otherwise.

Pearson's call for greater reciprocity and community responsibility is also not an either/or suggestion. It is completely consistent with a rights framework, and indeed, as the rights framework for reconciliation set out in *Social Justice Report 2000* demonstrates, it is an integral component.

The equation of the Pearson approach with the government's mutual obligation and practical reconciliation agenda also applies to the concepts of reciprocity and community. Significant differences exist between Pearson's representation of these values and those which actually apply in an Indigenous cultural setting, specifically with regard to whom reciprocity is owed and to which community.

In his discussion of 'reciprocity' as it features in Pearson's proposals for Aboriginal welfare reform, David Martin distinguishes between reciprocity as a principle of social obligation in Indigenous communities and mutual obligation as articulating a particular relationship between the State and the individual. Reciprocity in this sense applies 'between the individual and his or her particular community, family and local group', whereas mutual obligation applies 'essentially between the individual, as an autonomous actor, and the state, representing an undifferentiated "community"'.¹¹⁰

The goal of the latter is to ensure that 'people ... take their place as individuals in an increasingly mobile workforce within a globalised order'¹¹¹ through participation in the formal economy. This means that Indigenous participation in traditional and cultural forms of reciprocity is not necessarily easily factored

107 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 2*, AGPS Canberra, 1991, p377.

108 Aboriginal and Torres Strait Islander Commission, *Recognition, rights and reform*, ATSIC, Canberra, 1995, para 1.8.

109 Altman, J and Sanders, W, *From exclusion to dependence – Aborigines and the welfare state in Australia*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, 1991.

110 Martin, D, *op.cit*, p 32.

111 *ibid*.



into the mutual obligation equation.¹¹² However, the CDEP Scheme has operated to support aspects of the more traditional lifestyles of some communities and the Community Participation Agreements are to recognise certain social and cultural forms of participation. But as David Martin has observed:

...the obligations accorded significance by Indigenous people are typically not to the wider, largely non-Indigenous society, from which after all they have historically been excluded or at best marginalised: on the contrary, their obligations lie within Indigenous society itself, for example to specific kin or within 'family' networks.¹¹³

Forms of non-economic participation often fulfil certain obligations and contribute to 'community' life:

For example, not having any employment in the Australian labour market may actually empower many traditional Indigenous peoples to hunt, fish, paint, and live on the country. Indeed, the extra hours of 'spare' time may facilitate more extensive participation in ceremonial activities, thus increasing what may be loosely defined, in the Indigenous context, as 'social capital'.¹¹⁴

In addition, many Indigenous Australians are:

already meeting their obligation to community by participating in community building, cultural maintenance and family support activities, including: volunteer roles in community organizations; the CDEP scheme; income distribution among family members; caring for sick and elderly people – rather than placement in nursing homes; and reinforcing tradition and culture.¹¹⁵

In her research on communities at Yuendumu in Central Australia and Kuranda in North Queensland, CAEPR researcher Diane Smith found that:

Family members fall back upon culturally-based values, their own system of shared child care, and networks of economic support and demand sharing. This Indigenous system of support is a form of risk-pooling that keeps many families financially afloat. It constitutes precisely the kind of 'social participation' and 'social capital' identified by the McClure Report as the very base of strong families and communities.¹¹⁶

However, this kind of 'social participation' and 'social capital' may fall short of public policy agendas to stimulate labour market participation. Certain social support activities may be seen as comparable, or even more important or predictable than such participation: 'Attractive salaries, travel and accommodation or guarantees of special support and promotion opportunities

112 See Rowse, T, 'McClure's "Mutual obligation" and Pearson's "reciprocity" – can they be reconciled?', paper for the Academy of the Social Sciences workshop: 'Mutual obligation and welfare states in transition', University of Sydney, 22-23 February 2001.

113 Martin, D, *op.cit*, p32.

114 Hunter, B, 'Social exclusion, social capital, and Indigenous Australians: Measuring the social costs of unemployment', discussion paper no.204, CAEPR, Canberra, 2000, p2.

115 ATSIC, 'Social Welfare Reform: ATSIC Submission, *op.cit*, p.7.

116 Smith, D, quoted in ATSIC, 'More than Work for the Dole', *op.cit*, p 17



may not compensate for the loss of social support many Indigenous people feel when entering a mainstream labour market program'.¹¹⁷

There has been an increasing emphasis on community capacity building and social obligations in mutual obligation policy development since the McClure Report. However, as the above discussion indicates, the term 'community' carries some complex connotations in the policy Indigenous context:

the 'community' ... is not just an aggregation of individuals, as the non-Indigenous welfare policies would have it. Nor is it an undifferentiated 'community'. Rather, reflecting basic Indigenous structures, it should be seen as being comprised of 'family' or other relevant sub-groupings.¹¹⁸

The construction of 'community' as a focus of Indigenous policy since the mid-1970s in the post-assimilation Whitlam era has imposed some additional limitations. This approach has established an array of Aboriginal community organizations as 'gate-keepers' and 'avenues of self-determination' at the local level:

... enabl[ing] the government to distribute funds for welfare programs and the delivery of services to Aboriginal people. It was seen as the medium which would automatically be culturally appropriate, democratic, and at the same politically and socially acceptable to the majority of Australians.¹¹⁹

However, many of these 'communities' are based in former colonialist institutions and practices of missions, reserves and pastoral stations and the dispossession and relocation of Indigenous populations. These constructions of Indigenous communities have in fact contributed over time to the erosion of Indigenous social, cultural and economic rights and the development of intergenerational poverty and welfare passivity.¹²⁰ This is reflected in the term 'mission mentality' which was coined by Aboriginal activists in the 1980s to describe 'the "dependency" upon the government handout system that Aboriginal people have become conditioned to'.¹²¹ The continued use of these culturally inappropriate classifications of 'community' has the potential to contribute to the assimilation process, as it embeds the loss of Indigenous wellbeing and social cohesion by undermining traditional authority structures and kinship responsibilities, on occasion exacerbating pre-existing inequities and intra-Indigenous conflict.¹²²

117 Schwab, R, 'The calculus of reciprocity: Principles and implications of Aboriginal sharing', CAEPR discussion paper no.110, CAEPR, Canberra, 1995, pp.15-16, quoted in Rowse, T, 'Representing the two cultures of Indigenous poverty', SPRC Conference paper, 4 July 2001, p4.

118 Martin, D, *op.cit.*, p7.

119 Peters-Little, F, 'The community game: Aboriginal self-definition at the local level', AIATSIS research discussion paper no.10, www.aiatsis.gov.au/research/dpcommunity.htm (10 November 2000), pp12-13.

120 *ibid.*, pp17-18.

121 *ibid.*, p18.

122 *ibid.*



Care must be taken that the application of whatever public policy prescriptions may be in vogue, especially without adequate consultation and negotiation with Indigenous people, does not have the potential to inflict further damage as the following observations on the use of the term 'social capital' in Indigenous policy indicate:

Social capital is an important notion which helps open up a vision of Australian society in which Indigenous people actively participate. Yet any vision of what an 'ideal' society might look like in the future is usually constructed by theorists with little or no dialogue and negotiation with Indigenous Australians ... The reality is a social and political vision which can inadvertently perpetuate the marginalisation of Indigenous Australians unless they assimilate on white terms.¹²³

While Indigenous people in urban and rural centres are often supported by mainstream services, those living in more remote areas often depend 'almost totally on the coordinated processes of several different government jurisdictions, underpinned by financial support from the Aboriginal and Torres Strait Islander Commission (ATSIC)'.¹²⁴ It is necessary to find 'the appropriate type of social and infrastructure program to suit people whose distinct culture alienates them from the demands of some institutions in which they are governed'.¹²⁵ In discussing remote settlements, HREOC's *Review of the 1994 Water Report* observes that the challenge is to reconcile current service delivery issues for remote Indigenous communities with 'the rights that members of those communities may seek to exercise', particularly 'the principle of non-discrimination; the principle of distinct status; and group as distinct from individuals'. It states:

These factors are more closely linked with recognition and respect for another culture rather than providing access to conventional market opportunities. The challenge is to meet distinct group needs (households and communities) on Indigenous land, through delivery mechanisms which are cost-effective, demand driven and sustainable.¹²⁶

Conclusions – Indigenous empowerment and effective participation

This chapter has raised a number of concerns about the application of the combination of practical reconciliation and mutual obligation to Indigenous people. Ultimately, these concerns relate to this approach's narrow definition of the relationship between Indigenous people and the mainstream society, and the punitive way that it seeks to impose the relationship through harsh penalties. To date this approach has failed to transform the relationship between Indigenous people and the mainstream society so that it is conducted on a basis of greater

123 Dudgeon, P, Abdullah, J, Humphries, R, and Walker, R, *Social capital and increasing Aboriginal participation in mainstream courses: Weaving the threads of social fabric or spinning another yarn*, Centre for Aboriginal Studies, Curtin University of Technology, Perth, 1998, p 5, quoted in Hunter, B, *op.cit*, p25.

124 Fletcher, C, 'Aboriginal regional Australia: The hidden dimension of community governance,' Regional Australia Summit paper, Parliament House, Canberra, 27-29 October 1999, p2.

125 *ibid*, p1.

126 Aboriginal and Torres Strait Social Justice Commissioner and Acting Race Discrimination Commissioner, *Review of the 1994 Water Report*, HREOC, Sydney, 2001, pp 71-2.



equality and in a manner that is freely determined by Indigenous people.

As a consequence, while it strives for empowerment at an individual level, mutual obligation does so from a position in which the government is not prepared to relinquish the power and control that it holds. The unwillingness to change the existing power dynamic ultimately constrains the relevance of the mutual obligation approach to achieving lasting and sustainable change.

Changes to this power dynamic, through the effective participation of Indigenous people in decisions that affect them, are essential.

On the eve of the 2001-02 budget ATSIC released a document which sought to examine the policy approaches that underpin Indigenous policy formulation. The central contention of ATSIC was that for all programs and policy proposals, the 'values and aspirations that are meaningful to, and express priorities of, Australia's Indigenous peoples must be the basis for the policy approaches being taken'.¹²⁷

Accordingly, the question that should be answered in relation to each proposed initiative is, simply 'Will this activity enhance Indigenous people's capacity to achieve what is important to them and, in its development and implementation, contribute to the empowerment of Indigenous peoples and the achievement of *their* objectives and priorities?'¹²⁸

It is difficult to see that mutual obligation fulfils this criterion in its present form, particularly given that it is about the responsibilities and duties of the individual Indigenous citizen rather than about the obligation of the State, within an historical framework, to ensure that:

... 'mainstream' programs and service providers... adapt their program policies and administrative requirements and practices to accommodate the legitimate values, beliefs and lifestyles of their Indigenous clients.¹²⁹

Its terms of reference are simply too narrowly focused to fully appreciate and take account of the broader context of the everyday lives of Indigenous people.

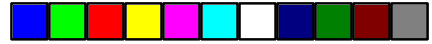
Any proposed levers for 'breaking the welfare cycle' should be evaluated to see whether they generate long-term, targeted outcomes or merely offer yet another round of potentially self-defeating quick fixes. Serious application, including consideration of the use of special measures, needs to be made to the question of how an adequate investment can be made to build both financial and human capacity to address Indigenous employment need, particularly in the futures of our young people. Any commitment to overcoming disadvantage should also involve a full democratic partnership with Indigenous people, '[e]nsuring that [Indigenous] individuals and communities are adequately involved in decisions that affect their well being, including the design and delivery of programs'.¹³⁰ It should also provide support for Indigenous autonomy in terms that recognise and respect cultural difference and the right to self-determination, particularly in the form of strategies for capacity-building and

127 ATSIC, *Directions for change, op.cit*, p1.

128 *ibid*.

129 *ibid*, p3.

130 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000, op.cit*, p88.



66



increasing self-governance.

These issues are explored in greater detail in the next chapter of this report. In particular, it examines the necessity for devolving power to the community level, through development and support for building the capacity of Indigenous communities to determine their own destiny and take control of their lives. Within this context, a mutual obligation approach can be more meaningful in the longer term.



Chapter 3

67

Indigenous governance and community capacity-building

Last year's *Social Justice Report* noted that to date there has been insufficient attention by governments to processes which ensure greater Indigenous participation and control over service design and delivery as part of an overall strategy to redress Indigenous disadvantage and economic marginalisation. I observed that:

The development of governance structures and regional autonomy provides the potential for a successful meeting place to integrate the various strands of reconciliation. In particular, it is able to tie together the aims of promoting recognition of Indigenous rights, with the related aims of overcoming disadvantage and achieving economic independence.¹

Over the past year, Reconciliation Australia and the Council of Australian Governments have included strategies in these areas as part of their frameworks for progressing reconciliation. Government initiatives have also been introduced as a result of the Indigenous Community Capacity Building Roundtable held in October 2000 and as part of the welfare reform package in the 2001 federal budget.

This chapter considers the importance of, and recent developments in, Indigenous capacity-building and governance. Capacity-building relates to 'the abilities, skills, understandings, values, relationships, behaviours, motivations, resources and conditions that enable individuals, organisations, sectors and social systems to carry out functions and achieve their development objectives over time'.² Governance concerns 'the structures and processes for decision making... [and] is generally understood to encompass stewardship, leadership, direction, control authority and accountability'.³

- 1 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC, Sydney, 2000, (Herein *Social Justice Report 2000*), p107.
- 2 ATSIC, 'Discussion paper on ATSIC's approach to community capacity building', unpublished paper, ATSIC, Canberra, 2001, p1.
- 3 ATSIC, 'Regional autonomy for Aboriginal and Torres Strait Islander communities – Discussion paper', ATSIC, Canberra, September 1999, p22.



There are many familiar elements in current proposals for capacity-building and governance – such as the need for increased Indigenous participation in decision-making, better coordination and less duplication of services, and greater regional and local involvement – that have previously been put forward at the Indigenous policy-making table in other contexts. This chapter examines some of the necessary requirements for capacity-building to be effective in reversing the disadvantaged experienced by many Indigenous communities today and considers a range of recent initiatives to develop or enhance Indigenous governance and capacity.

Governance and capacity-building – addressing Indigenous economic marginalisation

The *Social Justice Report 2000* put forward a human rights framework for achieving meaningful reconciliation.⁴ This framework has the following integrated components:

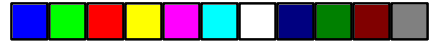
- An unqualified national commitment to redressing Indigenous disadvantage through the adoption of a long term strategy which progressively reduces the level of disadvantage and ensures whole of government and cross-governmental coordination;
- The facilitation of adequate, nationally consistent data collection to guide decision making and reporting, with appropriate monitoring and evaluation mechanisms;
- The agreement of benchmarks and targeted outcomes through negotiation with Indigenous peoples and organisations, state, territory and local governments and service delivery organisations, with clear timeframes for achieving longer term and short term goals;
- National leadership to facilitate inter-governmental cooperation and coordination;
- The development of greater partnership approaches to ensure the full and effective participation of Indigenous peoples in the design and delivery of services; and
- The adequate protection of human rights, including through constitutional means, and negotiations on mechanisms to overcome the structural inequalities caused by the systemic racism and lack of recognition of Indigenous cultures in the past.⁵

Central to this approach is the commitment of governments to long-term processes to redress Indigenous marginalisation and acknowledgement of the necessity for a changed relationship between Indigenous people and the mainstream society. As the previous chapter noted, anything less than this will not be able to bring about lasting change to the state of economic marginalisation currently experienced by Indigenous people.

The necessity for such a changed relationship underpinned the approach the Royal Commission into Aboriginal Deaths in Custody, which saw the

⁴ *Social Justice Report 2000*, Chapter 4.

⁵ For full recommendations, see *ibid*, pp130-132, www.humanrights.gov.au/social_justice/sj_report/chap4.html#ch4_recommend



disempowerment of Indigenous people through governmental control as the main barrier to the equal enjoyment of rights by Indigenous people. The Royal Commission made recommendations for longer term, more flexible forms of funding arrangements which would ensure increased Indigenous participation. In particular, it recommended that Commonwealth, State and Territory governments introduce triennial block grant funding for Indigenous organizations, and that 'wherever possible this funding be allocated through a single source with one set of audit and financial requirements but with the maximum devolution of power to the communities and organizations to determine the priorities for the allocation of such funds'.⁶

Fundamentally, government modes of service delivery to Indigenous people to date have operated, no doubt unintentionally, to constrain Indigenous social and economic development. As ATSIC have noted:

the debate in Australia has been confined to improving the prevailing 'directed community services model'. This model aims to provide services to Indigenous people as a category of disadvantaged Australians. Most funding is at the discretion, as well as the direction, of Commonwealth, State and Territory government agencies...⁷

Few Indigenous people can exercise any substantive jurisdictional responsibilities over matters of the most direct concern to them. They are almost totally dependent on government funding arrangements designed to deliver programs and services based on non-Indigenous models of governance. Commonwealth, state and local governments do not share any of their substantial jurisdictional responsibilities, few are prepared even to consider negotiations with Indigenous peoples.⁸

Such a 'community service model' is devoid of any connection to economic development:

Current funding arrangements provide little encouragement to Indigenous economic development since the resourcing of Indigenous organisations does not increase with increases in economic activity in their local area. Without such a linkage, the idea of development is reduced to one of 'community development' devoid of any economic dimension. Service delivery itself brings few economic benefits and little stimulus to Indigenous economic advancement.⁹

Similarly, it does not promote effective Indigenous participation:

The idea of self-determination is intimately linked with that of a political community, or people, having a right and ability to determine its own

6 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 4*, AGPS, Canberra, 1991, p21. Other Reports that have raised similar concerns: *Attorney-General's Department Review 1995*; *Review of the Aboriginal Councils and Associations Act Final Report 1995*; *Report of the Special Auditor 1996*, *Reports of the Auditor-General*; *Review of financial accountability requirements of Aboriginal and Torres Strait Island Councils*, *ATSIC Report on Greater Regional Autonomy*. For some discussion see ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper*, ATSIC, Canberra, 2000, Appendix 2 – 'Some recent reports dealing with Indigenous funding issues'.

7 *ibid*, piv.

8 *ibid*, p22.

9 *ibid*.



priorities and design its own instruments of communal regulation and provision. It is not furthered by the present system of highly externally directed arrangements for funding Indigenous organisations in Australia, nor service delivery by non-government organisations. Self-determination requires that there should be at least some aspects within the funding arrangements that allow Indigenous incorporated bodies to determine their own priorities and strategies, and recognise them as political communities of peoples with their own governance arrangements. It has often been argued, following this line of reasoning, that current arrangements in Indigenous affairs only amount to community self-management of individual programs, rather than self-determination.¹⁰

As I noted in last year's report, Indigenous self-determination is not 'merely an end in itself' but 'has at its end the process of social and economic equality'.¹¹ It involves the 'right to demand full democratic partnership' in society, by which Indigenous peoples 'negotiate freely their status and representation in the State in which they live... This does not mean the assimilation of Indigenous individuals as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms'.¹² A 'full democratic partnership' means effective participation and partnership in any decision-making processes that affect Indigenous people – not on the basis of 'sameness', but in such a way that recognises the unique status of Indigenous peoples, and which respects and gives appropriate expression to their distinctive cultures within societal structures.

Building community capacity provides a potential vehicle for the renewal of societal structures and the political recognition and representation of Indigenous peoples' status. The development of effective community capacity and governance arrangements may give rise to the creation of regional arrangements that link local community control with state level decision-making.¹³ This does not necessarily entail the creation of another level of government, although this may be a possible option in areas where existing arrangements are found to be inadequate for the provision of services and political representation.¹⁴

The current approach of governments does not yet place sufficient importance on these factors. It operates within a short term timeframe and without consideration being given to the aspirations, priorities or empowerment of Indigenous people. It has generally resulted in uncoordinated funding arrangements between government departments and levels of government, and led to what last year's *Social Justice Report* termed as a process that manages – rather than seeks to overcome – the level of Indigenous disadvantage and inequality in Australian society. This is now being combined with a mutual obligation approach to welfare reform and welfare dependency as discussed

10 *ibid*, p4.

11 *Social Justice Report 2000*, p28.

12 Daes, E, *Discrimination against Indigenous people – Explanatory note concerning the draft declaration on the rights of Indigenous peoples*, UN Doc E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, para 26.

13 For further discussion, see *Social Justice Report 2000*, pp112-21.

14 ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper*, *op.cit*, pv.



in the previous chapter, which possesses some highly individualistic and ahistorical elements. It is yet to become clear as to whether the emphases on a broader network of obligations and social partnerships promoted through the McClure Report will provide the grounds for equitable and sufficient reform of the current welfare system and employment situation for Indigenous Australians. As ATSIC explain in highlighting the key directions necessary for change for Indigenous people:

The range of social, economic and cultural issues confronting Indigenous communities and peoples requires both general and specific responses in facilitating change. The wider the involvement of all the Indigenous people in developing their capacities to determine the nature, pace and objectives of change, the more likely it will be that the changes will be effective and sustainable. While there can be no certainty that outcomes will be achieved in every instance, it is certain that effective facilitation will lead to useful learning for the participants, and make a clear break with the 'Welfarist' approach to Indigenous community development.¹⁵

The necessity of this approach has also been highlighted by the Commonwealth Grants Commission in its review of Indigenous funding need. The purpose of the Commission's inquiry was to establish a method to 'determine the needs of groups of indigenous Australians relative to one another'.¹⁶ The Commission identified seven key principles for aligning Indigenous funding closer with the level of need as follows:

- (i) the full and effective participation of Indigenous people in decisions affecting funding distribution and service and service delivery;
- (ii) a focus on outcomes;
- (iii) ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;
- (iv) ensuring genuine collaborative processes with the involvement of government and non-government funders and services deliverers, to maximise opportunities for pooling of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;
- (v) recognition of the critical importance of effective access to mainstream programs and services, and clear actions to identify and address barriers to access;
- (vi) improving the collection and availability of data to support informed decision making, monitoring of achievements and program evaluation; and
- (vii) recognising the importance of capacity building within Indigenous communities.¹⁷

They also identified the key areas for action to implement these principles, given current funding arrangements as to:

15 ATSIC, *Directions for change*, ATSIC, Canberra, 2001, p9.

16 Commonwealth Grants Commission (CGC), *Report on Indigenous funding 2001*, CGC, Canberra 2001 (Herein CGC, *Report on Indigenous funding*), pxii.

17 *ibid*, p90.



- Identify and address the barriers to access that Indigenous people face in using mainstream programs;
- Establish funding arrangements that reflect the long term and wide ranging nature of Indigenous need;
- Establish a defined role for Indigenous people in decision making on the allocation of funds and service delivery at the Commonwealth, state and local level;
- Take steps to improve the capacity (of Indigenous people and communities) to manage; and
- Collect better data.¹⁸

The Commission stated that, 'we see a practical reason why Indigenous people must be involved in deciding how funds should be allocated to meet their needs – the need for judgement'.¹⁹ The report emphasised the necessity of 'value judgements', particularly by Indigenous people but also by experienced service providers, in defining indicators of need, determining effective outcomes and 'how equity is to be achieved'.²⁰

Accordingly, the Commission identified the following features for enabling effective participation by Indigenous people at the community level in aligning resources to meet needs: full participation in identifying needs and in decision-making about funding for provision of services; resourcing participation in those discussions; control of service provision; and the ability to form productive collaborative arrangements with the main providers of services.²¹

The Commission stated specifically on the importance of developing Indigenous community capacity that:

The relationship between capacity building and the achievement of service outcomes needs to be recognised in funding decisions. The success of programs will be compromised if funding is not provided to invest in community capacity building... building community capacity, especially developing the capacity of Indigenous organizations and communities to manage service delivery, is a crucial step in ensuring that Indigenous people play a central role in decision-making and more effective use of funds.²²

ATSIC have similarly argued that:

It is only if the members of the community can influence, if not determine, the use of resources available to them that they are likely to be used in accord with the preferences of recipients. Only if it accords with those preferences will those resources give the maximum benefits to the recipients.²³

The relationship between capacity building and achieving service outcomes needs to be recognised and acted upon – building capacity can assist

18 *ibid.*

19 *ibid.*, p89.

20 *ibid.*

21 *ibid.*

22 *ibid.*, p94.

23 ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper*, *op.cit.*, pvi.



Indigenous organizations to be more effective in identifying needs and appropriate funding, and in participating in collaborative decision-making arrangements. The Commonwealth Grants Commission argues that developing effective community capacity is of equal importance to meeting infrastructure needs and that communities lacking this kind of capacity will need a higher initial investment of resources to 'provide a framework for the effective delivery of services and sustainable outcomes'.²⁴ An investment over time to build this capacity is crucial.

This will be easier for some communities than for others. The Commonwealth Grants Commission noted, for example, the following factors as critical for improving the capacity of Indigenous communities to manage:

- level of social cohesion;
- strength of culture;
- provision of relevant education and training in areas such as corporate governance, management and information collection and use;
- transfer of positions in service delivery from external sources to communities over time;
- building economic and social self-reliance within communities through use of CDEP to foster small business and build up communities; and
- fostering home ownership to consolidate commitment to community's future.²⁵

These factors reinforce the requirement for a longer term commitment to governance and capacity building processes in order to address Indigenous economic marginalisation.

Current initiatives for building Indigenous capacity and governance

There have been a range of positive developments in relation to building Indigenous capacity and governance recently. There is increasing understanding among Commonwealth government departments that single portfolio or program-based interventions are insufficient to address problems facing Indigenous communities. Many are increasingly accepting the necessity 'to address governance issues for Indigenous communities and organizations as a priority, and [that] this should be a key factor in shaping a model of capacity building'.²⁶

There are some existing mainstream programs which are able to be utilised to strengthen Indigenous community capacity. These include the Department of Family and Community Services' (DFACS) Family and Community Networks Initiative for developing the capacity of families and communities to respond to local issues through strengthening family and community networks, improving access to information and delivering local-based initiatives. DFACS also provides support for community-based initiatives through its Stronger Families and Communities Strategy. The Department of Employment, Workplace Relations

24 CGC, *Report on Indigenous funding*, p95.

25 *ibid.*

26 ATSC, 'Discussion paper on ATSC's approach to community capacity building', *op.cit.*, pp1-2.



and Small Business has allocated \$10 million over four years under its Community Business Partnership for business and the community to work together to increase opportunities for people with disabilities, mature age people, Indigenous people and parents.²⁷

Indigenous support for community capacity-building has also been given in the October 2000 Indigenous Families and Communities Roundtable's communiqué, which identified the following principles:

- Flexibility in programme administration;
- Coordinated, whole of government responses;
- Collaborations between business, churches, Indigenous organizations, other non-government bodies and the broader community;
- Building upon existing strengths and assets within families and communities;
- The empowerment of individuals and communities in leadership and management; and
- Encouraging self-reliance and sustainable economic and social development.²⁸

As discussed in the previous chapter, the 2001-02 Budget also allocated \$32 million from July 2001 for trials in around 100 communities of Community Participation Agreements in regional and remote areas.

Reconciliation Australia has also identified as a key priority in its Strategic plan support for developing Indigenous community capacity:

Stable Indigenous organisations that are accountable to their communities, and responsive to their needs and values, form the critical foundations for community and family well-being. Such institutions also provide the essential mechanisms through which leadership is exercised in dealing with governments, their various agencies, and the private sector.

In Australia there has been limited sustained attention given to issues of governance and capacity-building in Indigenous communities through their local and regional representative organisations. Conversely, the issue of Indigenous governance, capacity building and devolution of service delivery has been a central policy focus in Canada and the United States for a number of years. This overseas experience has confirmed that successfully addressing community dysfunction and improving socio-economic outcomes is directly linked to:

- communities having genuine decision-making power;
- exercising that power through effective institutions; and
- governing institutions acquiring legitimacy with the people whose future is at stake.²⁹

27 Vanstone, the Hon A, and Abbott, the Hon T, 'The Prime Minister's community business partnership - Working together', *Australians working together - Helping people to move forward, Fact Sheet 20*, www.together.gov.au/GovernmentStatement/FactSheets/FS20.asp (20 December 2001).

28 ATSIC, 'Discussion paper on ATSIC's approach to community capacity building', *op.cit.*, p3.

29 Reconciliation Australia, *Strategic plan 2001-2003*, Reconciliation Australia, Canberra 2001, para 1.4.



Accordingly, Reconciliation Australia have committed to a national conference to examine current and future Indigenous governance issues, including the 'current legislative and corporate framework, leadership and capacity building, and best practice in Australia and overseas'.³⁰ Following on from this, Reconciliation Australia plan to 'highlight and promote best practice in Indigenous governance through the provision of appropriate training, education and capacity building' in 'partnership with relevant institutions and consistent with conference outcomes'.³¹

In its communiqué of November 2000, the Council of Australian Governments (COAG) also committed 'to an approach based on partnerships and shared responsibilities with Indigenous communities, programme flexibility and coordination between government agencies, with a focus on local communities and outcomes'.³² This approach forms the basis of its reconciliation framework under which relevant Commonwealth/State Ministerial Councils are to develop actions plans for improving social and economic outcomes for Indigenous people within a 12-month period. COAG is to take a leading role in implementing this reconciliation framework, periodically reviewing and reporting back to the Prime Minister on progress made.

As noted in the introductory chapter of this report, this communiqué follows on from COAG's previous national commitment to improved service delivery outcomes for Indigenous people from 1992, as well as from the commitments of governments to the recommendations of the Royal Commission into Aboriginal Deaths in Custody and numerous other reports and inquiries.

As the lead agency on capacity building within the COAG framework for advancing reconciliation, ATSIC is to drive the process of obtaining acceptance of agreed core principles across government, in partnership with key agencies and jurisdictions. Together with the Department of the Prime Minister and Cabinet (PM&C) it 'may promote a Commonwealth methodology around community capacity building which focuses on the development of one central administrative process across Commonwealth agencies for the movement of resources to communities and regions'.³³

These initiatives are important in moving towards changing the relationship between Indigenous communities and governments, and for re-empowering communities to take control of their circumstances. The commitments to this process to date, however, remain short-term and minimal in terms of funding support. While these initiatives are to be welcomed, they only hint at the potential for reconfiguring and transforming the relationship of Indigenous communities with the mainstream society. Indigenous community capacity and governance mechanisms could be furthered through facilitating more effective forms of financial and administrative self-government.

30 *ibid.* The conference, *Understanding and implementing good governance for Indigenous communities and regions*, will be convened by Reconciliation Australia, ATSIC and the National Institute for Governance at the University of Canberra in April 2002.

31 *ibid.*

32 COAG, Communiqué November 2000, p5. www.pmc.gov.au/docs/coag031100.cfm (11 December 2001).

33 ATSIC, 'Discussion paper on ATSIC's approach to community capacity building', *op.cit.*, pp4-5.



For example, the CGC recommended that fundamental improvements could be made through a move to an outcomes-based approach to current Indigenous funding and arrangements. A focus on 'outcomes' takes into account what has been achieved in terms of the inputs invested in meeting needs: that is, the resources given to service providers to provide services or facilities, and the outputs these service providers achieve with their given levels of input,³⁴ whereas 'need' merely indicates the difference in relative status between particular groups or individuals – specifically, 'the difference between an existing situation and an acceptable one'.³⁵

An outcomes-based approach to the distribution of funds is in keeping with the principle of substantive equality as it has the capacity to take into account different variables such as the impact of geographic, economic, and demographic variables on mainstream programs across the regions, and the varying levels of Commonwealth, State and Territory involvement in service provision. It is also able to take into account the investments made over periods of time, so that assets less easily calculable, such as investments in organisational capacity and people over a long period, are not jeopardised. More importantly, the CGC's recognition of the necessity of value judgements in determining outcomes, and the role of Indigenous people at the level of decision-making, provides an opportunity to increase their participation.

Other recent perspectives link the need for greater participation and community capacity with the development of Indigenous self-governance arrangements that re-define the current financial and administrative relationship between government and Indigenous communities.

'Resourcing Indigenous Development and Self-Determination', a Scoping Paper prepared for ATSIC in September 2000 by the Australia Institute links political recognition with the achievement of proper autonomy and self-sufficiency for Indigenous peoples:

Under current financial arrangements Indigenous organisations have neither the means nor the incentive to develop the economic base of their communities. Sustainable development is a long-term process that requires assured funding over a number of years. This is not available without some kind of entitlement. It requires political support from their communities that very few of the current organisations can get because they have no defined jurisdictional responsibilities (other than those stated in their constitutions).³⁶

The paper argues that aspects of a new order of Indigenous governance could include:

- Replacement of discretionary tied grants with more flexible and varied funding arrangements;
- A diversity of governance arrangements to be developed over time, including the potential to develop governance arrangements with new

34 CGC, *Report on Indigenous funding*, p10.

35 *ibid.*

36 ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper, op.cit.*, p14.



jurisdictional responsibilities (e.g. in relation to a land base) or within existing governmental structures;³⁷ and

- Allocation of rights and responsibilities for a broad range of functions and decisions, including political, cultural, social and economic.³⁸

Indigenous jurisdiction is 'likely to extend to matters that are internal to the group, integral to its distinct culture, and essential to its operation as a political and cultural community'.³⁹ Some of the areas that could be covered by these governance arrangements are:

- Establishment of governing structures, elections and membership;
- Maintenance of Indigenous languages, culture and religion;
- Child welfare, education, health and social services;
- Administration and enforcement of Indigenous laws;
- Land and resource management, including zoning, service fees, land tenure and access; development of own-source revenue opportunities;
- Management of public works, infrastructure, housing, local transport; and
- Licensing, regulation and operation of businesses located on Indigenous lands.⁴⁰

The Scoping Paper advocates that existing processes of intergovernmental financial transfers be extended to facilitate these governance arrangements. An Indigenous order of governance would mean that:

Indigenous organisations would be dealt with differently by Commonwealth, State and Territory, and local governments in a number of ways... negotiated with as equals, rather than simply directed to work within pre-established program and service delivery guidelines. They would be accorded their jurisdiction and some reasonably durable and guaranteed source of finance for exercising that jurisdiction.⁴¹

Noel Pearson has also made arguments for government payments to be made to communities: 'Government transfers are valuable and necessary resources, but the welfare nature of these transfers has to be changed in order to make it a useful and productive resource'.⁴² The issue for Pearson is the way in which welfare is delivered to Indigenous communities: in the past, 'welfare in the negative sense' has been delivered to individuals or to community organizations to deliver to individuals, undercutting Indigenous patterns of sharing and obligations and creating a 'money for nothing' mentality.⁴³ Pearson argues that

37 An example of the former is the proposals developed by the Combined Aboriginal Nations of Central Australia for governance on their own land base; of the latter, the establishment of the shire of Ngaanyatjarraku in Western Australia.

38 ATSIC, *Resourcing Indigenous development and self-determination – a scoping paper*, *op.cit.*, ppv-vi.

39 *ibid.*, p7.

40 *ibid.*, pv.

41 *ibid.*, pvi.

42 Pearson, N, *Our right to take responsibility: Discussion paper*, Noel Pearson and Associates, Cairns, 1999, p57.

43 *ibid.*, pp56-8.



Aboriginal communities do not receive their 'fair share of the country's resources' and in fact need more in order to facilitate a level of development that will lead to sustainable economic participation. Pearson's notion of a 'regional interface' between government, Indigenous communities and other stakeholders would provide a means of restructuring this relationship and enable Indigenous communities to exercise greater self-determination in receiving and directing government funds through reciprocity-based programs.

All of these approaches are geared towards increasing Indigenous participation in the management of their affairs and economic self-sufficiency, goals that at a glance would appear to be in keeping with the current government's policy emphases on self-reliance, practical reconciliation and mutual obligation. However, they extend this agenda in a number of ways. The individualistic focus of much contemporary welfare reform policy is challenged through the development of structures based on distinct Indigenous groupings to interface with government. These structures project a specific relationship with government and other stakeholders in which there is scope to determine the reciprocal roles and obligations of all parties involved. Self-determination through the creation of structures and processes that give recognition to distinct values and features of Indigenous cultures and societies is also a necessary dimension of these arrangements.

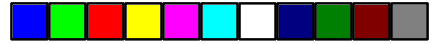
As discussed in Chapter 2, the McClure Report which has in part been endorsed by the Coalition government promotes a reformed participation support system that possesses some features directed towards expanding social obligations and partnerships across all levels of the community. The Community Participation Agreement (CPA) initiative introduced as part of the Budget 2001's welfare reform package is to provide a specific opportunity for remote Indigenous communities to develop their own definitions and applications of mutual obligation.

The two case studies presented in the following section, one of which is part of the CPA initiative, investigate the potential for Indigenous people to build capacity and develop governance arrangements in ways that adequately and appropriately give expression to their participation and self-determination within current social, economic and policy contexts.

Case studies of governance and capacity building initiatives

There are currently in place a number of processes where Indigenous communities and organisations have sought to create a new order of governance and autonomy. These include the ATSIC Murdi Paaki Regional Council Plan in New South Wales, which makes use of a coalition of community working parties to improve participation in regional planning and service delivery processes, and the Cape York Peninsula Partnerships Plan, which has built on Noel Pearson's proposal for a regional interface through developing partnership arrangements between the Cape York communities, the State Government and business leaders to address disadvantage through better integration of planning processes and identification of new operating practices. Both these models are precursors to the development of Indigenous governance structures.

These models, and others such as the ATSIC Miwatj Regional Council approach, were discussed in Chapter 4 of last year's *Social Justice Report*. This year's



report focuses on the Mutitjulu Community Participation and Partnership Agreement and Yenbena Indigenous Training Centre as examples of initiatives that seek to build capacity at a community level and increase Indigenous participation in and control over decision-making processes.

Modelling is taking place with the Mutitjulu Community Council and residents (Anangu people) located near Uluru-Kata Tjuta National Park as part of the Commonwealth's Community Participation Agreement (CPA) initiative being pioneered in the Budget 2001 package. This process seeks to provide opportunities for increased participation by community and other partners in building capacity as well as the basis for development of more effective funding and administrative mechanisms and potentially future governance arrangements.

The Yenbena Indigenous Training Centre is an initiative of the Yorta Yorta Nations Aboriginal Corporation in northern Victoria. It is an example of a community-directed capacity-building arrangement that seeks to combine employment and training initiatives with self-determination in response to a lack of effective whole-of-government approaches at State and Commonwealth levels.

Both models illustrate the potential, as well as the complexity, of new approaches to Indigenous service delivery and governance.

The Mutitjulu Community Participation and Partnership Agreement

Earlier this year ATSIC commissioned a consultancy to undertake research with a view to developing a Community Participation Agreement for the Mutitjulu Community Council and residents. This Agreement will be the first of its kind, 'a litmus test for the Commonwealth's new welfare policy approach' and 'a demonstration project for government in respect to its ability to provide a comprehensive approach to delivering the necessary support and funding, and to establish a practical partnership with the community'.⁴⁴

The Mutitjulu Community Participation and Partnership Agreement Report (herein the 'Report') was also a response to concerns expressed over several years by the community to ATSIC, Centrelink, DEWRSB, Parks Australia and other agencies in regard to welfare reform and service delivery issues.⁴⁵ The Report identified lack of coordination planning and service delivery by government, intergenerational welfare dependency and the existence of a multiplicity of governance structures as key factors in the erosion of the community's social, economic and cultural capital.

The Report also noted the community's substantial local economic, enterprise and employment opportunities, due to its location with thriving local tourism and arts industries; major (potential) employment and infrastructure benefits deriving from its joint management arrangement with Parks Australia and the world-heritage Park listing of Uluru-Kata Tjuta National Park; good institutional support, service delivery coverage and significant access to resources in the form of advisors, local service agencies, access to training providers, an adult

44 Smith, D, *The Mutitjulu community participation and partnership agreement*, unpublished material, CAEPR, Canberra, 2001, p1.

45 *ibid.*



education building, an Indigenous Job Network, and an Indigenous high school.⁴⁶

Despite the economic potential of their location, the Report observes that the Anangu 'seem to have remained marginal to many of the developments taking place on their lands'.⁴⁷ Sixty per cent of the community's population are working age and over sixty-four per cent are currently reliant on welfare. Those most consistently employed have a history of working on pastoral stations, and work now as consultants and casual rangers for the Uluru-Kata Tjuta National Park. Some employment is offered through Parks Australia, the Mutitjulu Employment Program, the Council and community agencies, although largely on a casual basis. Only one tour operator out of the operators and retail businesses operating from the resort employs Anangu people. The young people are largely unemployed or only employed on an intermittent casual basis, and tend to be reliant on older people and welfare payments for cash and resources.

Other flows of money – referred to as the 'money line' – provide additional resources in the form of rent and gate funds, and traditional owners receive further distributions and royalties. While the money line ensures that the community is not cash poor, these flows of money are unevenly distributed, sporadic and poorly targeted and act as a further disincentive against seeking employment or getting off welfare. High levels of educational disadvantage, health problems, incarceration of young males, and social dysfunction also make maximum participation in employment difficult. Participation through community governance structures and decision-making processes is further undermined by other corporate structures, the roles, functions and powers of which are ill-defined and, on occasion, lack accountability to the community.⁴⁸

It is recognised that there are no easy solutions to the problems facing the community, and the Report suggests that a 5-10 year commitment is necessary for the community Participation Program model to make any inroads on the current situation. This would involve 'a planned transition to community control and management, within the existing legislative framework, and in a real partnership between the Mutitjulu Community Council, the Federal Government and other key stakeholders'.⁴⁹ The model put forward is to cover all social security recipients at Mutitjulu and its key objectives are:

- A one-in all-in approach to participation;
- Recognising, through the development of a participation framework, the contribution of groups within the community;
- Identifying innovative approaches to money management within the community and encouraging improved budgeting and financial responsibility;
- Exploring alternative approaches to service delivery arrangements;
- Building the organisational and management capacity of the community; and

46 *ibid*, pp14-15.

47 *ibid*, p10.

48 *ibid*, p11-13.

49 *ibid*, p26.



- Exploring opportunities of more effective partnering with the business sector and non government sector.⁵⁰

Through its strategic framework the model also relies upon and promotes the principles of cultural relevance; individual entitlement rights; equitable access; community development; administrative workability; financial accountability and efficiency; and enhanced service delivery and outcomes for individuals and their families.⁵¹

Since the Report was finalised, a draft operational plan, participation program and activities have been developed for the Mutitjulu community and a Regional Project Coordinator has commenced to assist in the coordination requirements for the project and consolidate communication protocols between Community, departmental and other partners. A Commonwealth Reference Group has been established, consisting of representatives from key agencies including ATSIC, Department of Family and Community Services, Department of Reconciliation and Aboriginal and Torres Strait Islander Affairs, Department of Employment, Workplace Relations and Small Business, and Environment Australia. The Reference Group has made an undertaking to progress the development of the Mutitjulu Community Participation and Partnership Agreement through some of the key principles and goals of the Report.

This Reference Group provides a forum for addressing action areas identified in the COAG framework for advancing reconciliation as well as advancing the development of specific Community Participation Agreement projects. It has been proposed that a Heads of Agreement be negotiated between the Community Council and relevant federal government departments which will address such components as a delegation under the *Social Security Act 1999* for the Community Council to deliver income support payments; the 'one-in all-in' participation model; block funding; evaluation and monitoring; coordination at different levels; and a time-frame.

Issues to be addressed in the short-term include: development of participation activities with local agencies and stakeholders; assessment of staffing and facilities needed for Participation Program; establishment of a Regional Transaction Centre; provision of an ATM machine and assessment of community banking needs; establishment of an advisory committee; development of local *Partnership Protocols* for relationships between community and Commonwealth departments; design of Individual Participation Agreements and a Community Service Agreement; and the development of National and Regional Frameworks for facilitating the Agreement. ATSIC has also proposed the establishment of a Commonwealth Taskforce to progress development of Mutitjulu's Community Participation Agreement under the direction of the Reference Group.

Some aspects of the proposed Mutitjulu CPA model, such as the 'one-in all-in' participation approach and customising of compliance measures, suggest a degree of public policy innovation in Indigenous governance and capacity-building. However, a number of its propositions are by no means new and have been floated previously in contexts linked with a rights or self-determination

50 ATSIC, 'Discussion paper on ATSIC's approach to community capacity building', *op.cit.*, p5.

51 Smith, D, *op.cit.*, p2.



agenda rather than an emphasis on increased participation and welfare reform as the context of change. These include the Council's brokering role; consolidated block funding and acquittal package; the use of partnerships, national and local; and improvements to community financial services.⁵²

Community gateway for participation and administration

One of the Report's recommendations is that the Muiitjulu Community Council should act as the 'employer, broker and negotiator' for implementation and management of the Agreement. On behalf of the Council, Participation Program staff would formulate and implement Council policies and guidelines, and undertake administration of the Program, including delivery of a menu of participation activities. This would mean upgrading the Council's current hardware, software and office infrastructure to establish an electronically-based community financial and administrative system tailored to the operation of the Program and capable of linking all individual participation and income data which is in turn linked to Centrelink's database.

The Program would also be able to provide entitlements on a weekly basis to encourage better management of savings and expenditure. Community administration of the Agreement would be able to respond to some of the problems associated with Centrelink assessments of entitlement levels such as increased breach rates, termination of payments, incurred debt, and high levels of frustration with complex forms and Centrelink correspondence reported among Indigenous social security recipients.⁵³

The community gateway would thus assist in addressing some of the specific issues affecting remote Indigenous welfare recipients (especially those surrounding 'breaching') and deliver greater equity to participants. The brokering role envisaged for the Council also increases the scope for effective participation, greater community control and self-determination in the future. This concept has similarities with the recommendations of the Commonwealth Grants Commission in its Indigenous funding report that Indigenous people play a

52 A number of the Community Participation and Partnership Agreement's components, such as increased community control through the community gateway; education, employment and training options; partnerships with local stakeholders; and the consolidated block funding and acquittal package are similar to the issues negotiated in other agreements, often in the context of native title. See, for example, Craig, D, and Jull, P, 'Regional agreements – Options for Australian Indigenous peoples', in ATSIC, *ATSIC regional agreements seminar, Cairns, 29-31 May 1995*, ATSIC, Canberra, 1995, pp118-38; ATSIC, *Recognition, rights and reform: Report to government on native title social justice measures*, Commonwealth of Australia, Canberra, 1995, p57, which discusses the Commonwealth's government's potential role in facilitating regional agreements as part of a social justice package, and the Council for Aboriginal Reconciliation, *National strategy for achieving economic independence*, 'The actions we can take', www.austlii.edu.au/au/other/IndigLRes/car/2000/7/pg4.htm (10 November 2001). For research into the need for improved financial management options for Indigenous people, see Westbury, N, 'Myth-making and the delivery of banking and financial services to Indigenous Australians in regional and remote Australia', in Morphy, F, and Sanders, W, *The Indigenous welfare economy and the CDEP scheme*, research monograph no.20, CAEPR, Canberra, 2001, pp81-93, and McDonnell, S, and Westbury, N, 'Giving credit where it's due: A study of the delivery of banking and financial services to Indigenous Australians in rural and remote Australia', discussion paper no.218, CAEPR, Canberra, 2001.

53 Smith, D, *op.cit*, p39.



significant decision-making role in funding for mainstream services and that funding be pooled from different sources to achieve more effective outcomes for Indigenous people. It is also consistent with Noel Pearson's model of a regional interface between the Cape York Aboriginal communities and state and Commonwealth departments and agencies that would:

... provide the forum to negotiate how programs will be actioned and the respective roles of government agencies, regional organisations and local people.... the principle is partnership between the resource providers and our community – with the aim to maximise action, initiative and responsibility on the ground and to limit the role of government to providing resources and expertise.⁵⁴

As in Pearson's model, the Mutitjulu community gateway is reliant on sustained collaboration and support from other agencies, particularly in the initial stages of developing the community's administrative capacity to implement the program. The respective roles of government and the community in progressing a gateway or interface raise some complex issues in relation to self-determination. David Martin has commented recently on the difficulties inherent in implementing Pearson's model as follows:

While government may not have the moral authority with Aboriginal people to effect change, as Pearson suggests, it is arguable that it does have a moral responsibility to ensure that principles of social justice, equity, and accountability are adhered to in the utilisation of the resources it provides to address Indigenous socio-economic disadvantage. This, and the fractured nature of the contemporary Indigenous polity, suggest that government may need to be involved as 'partners' at a far more intimate and hands-on level than Pearson envisages, including assisting with the development of new Indigenous governance institutions and facilitating capacity-building within those institutional arrangements.⁵⁵

The timeframe given for the Mutitjulu CPA supports Martin's conjecture about the comprehensive level of government involvement required for the facilitation of new models of Indigenous governance. But while contemporary governments have a duty of care in assisting Indigenous people to develop autonomy, this must be exercised in accordance with Indigenous aspirations and self-determination. Ownership of any new governance models, whether developed through CPA or other initiatives, and the authority to implement them, must be ascertained from the Indigenous constituents to whom the models relate.⁵⁶

Additionally, the relationship of Indigenous kinship and authority structures to the processes and structures of these models should be taken into account in order to avoid further erosion of social cohesion in Indigenous societies and

54 Pearson, P, *op.cit*, p74. See also Murdi Paaki Regional Council plan's use of community working parties, as discussed in *Social Justice Report 2000*, pp116-17.

55 Martin, D, 'Is welfare dependency "welfare poison"? An assessment of Noel Pearson's proposals for Aboriginal welfare reform', discussion paper no. 213/2001, CAEPR, Canberra, 2001, p19.

56 A potential vehicle for ongoing ownership and evaluation of Mutitjulu CPA could be the provided by the establishment of a community process 'in conjunction with ATSIC and Centrelink, to monitor the process and evaluate the range of outcomes from a Community Participation Agreement.' Smith, D, *op.cit*, p70.



cultures. Martin has made the following observation about the damage inflicted on Aboriginal social control mechanisms through external interventions, such as the imposition of various administrative regimes on Indigenous people:

... the ever increasing interventions of external forces continue to rupture and subordinate the internal mechanisms of social control, and of socialisation, and the consequent chaotic circumstances require ever more staff to deal with it, so perpetrating the cycle.⁵⁷

In contemplating new models of governance and capacity-building, it is important that some of the more fundamental issues concerning the respective roles and authority of Indigenous, government and other partners are re-visited, or in time these new models may run the risk of becoming yet another case of a failed Indigenous policy initiative and a further source of 'blaming the victim'.

As Diane Smith has observed in regard to the capacity of national departmental coordination to support initiatives such as CPAs:

Departmental coordination has been an oft-stated government policy objective that has worn thin from overuse and under-implementation. One has to question whether it is a real possibility, or whether it merely serves as a convenient placebo for lack of capacity to deliver on the part of government and its departments. These Agreements will constitute a challenge to the capacity of ATSIC, DFACS, Centrelink and DEWRSB, in particular, to formulate the coherent enabling policy and consolidated program platform that are needed.⁵⁸

Consolidated block funding and acquittal package

Related to the community gateway concept is the Report's argument that the model needs to be based on the pooling of resources from multi-jurisdictional and cross-functional areas of government, through a consolidated budgetary package providing one incoming financial stream to the community. This package would comprise the recurrent block release of Centrelink entitlement funding for Mutitjulu recipients, and a consolidated block of cross-departmental program funding.⁵⁹ ATSIC would have a role in making a comprehensive audit of program funding and negotiating the package.

As noted above, there have been a series of recommendations for more flexible and longer-term funding arrangements such as block funding through a single source, triennial funding, and pooled funding from the reports of the Royal Commission onwards. At present, a cash-out approach to Centrelink allowances similar to that of the Aboriginal Coordinated Health Care Trials (where pooled funding is to be directed towards client need regardless of program or institutional boundaries) is being investigated with a view to further exploration of block and pooled funding.

57 Martin, cited in Atkinson, J, 'Violence against Aboriginal women: Reconstitution of community law – way forward' (August-September 2001) 5(11) *Indigenous Law Bulletin*, p20.

58 Smith, D, 'Community Participation Agreements: A model for welfare reform from community-based research', CAEPR discussion paper No.223/2001, CAEPR, Canberra, 2001, p38.

59 Smith, D, *The Mutitjulu community participation and partnership agreement, op.cit*, p44.



The acceptance and implementation of proposals such as these which seek to provide more effective funding arrangements for Indigenous communities and organizations is a pre-requisite for furthering Indigenous self-determination and self-management. It could also be linked to increasing Indigenous peoples' capacity to direct and manage jurisdictional responsibilities, and to raise revenue in the future. As ATSIIC's Scoping Paper on resourcing Indigenous governance notes, the present directed community services model has done little to increase Indigenous autonomy as 'the resourcing of Indigenous organisations does not increase with increases in economic activity in their local area. Without such a linkage, the idea of development is reduced to one of "community development" devoid of any economic dimension'.⁶⁰

Diane Smith has noted that there is some bureaucratic concern about the potential program costs associated with implementing Community Participation Agreements. However, as discussed in Chapter 2, any increases in the costs of measures for redressing Indigenous disadvantaged need to be assessed in terms of 'the progressive reduction and eventual elimination of the social costs accrued to Indigenous disadvantage'.⁶¹ Smith comments that given the likely increases in costs within the next decade for both government and Indigenous peoples in meeting Indigenous health, social and economic needs, 'the potential costs associated with enabling Indigenous welfare recipients to engage in purposeful participation, education and training, and community economic development under the Agreement framework arguably represent a longer-term cost saving in welfare, health and other program areas'.⁶²

Participation

The proposed Community Participation and Partnership Agreement relies upon participation as its key concept rather than mutual obligation or reciprocity. Participation is defined as:

the mobilisation of individuals, their families and representative community organizations to take an active responsibility for the planning and delivery of welfare services and income support payments, with the specific object of improving their well-being.⁶³

This definition is in keeping with the McClure Report's more expansive conception of mutual obligation as being underpinned by a network of obligations across the spectrum of the community. The McClure Report also observed the need for any application of this principle to Indigenous communities to be culturally relevant, responsive to individual circumstances, and developed through consultation at the local level.⁶⁴ As discussed in Chapter 2, there is already a precedent for Indigenous Australians' participation in a form of mutual obligation through the CDEP Scheme.

60 ATSIIC, *Resourcing Indigenous development and self-determination – a scoping paper*, *op.cit.*, piv.

61 *Social Justice Report 2000*, p26.

62 Smith, D, 'Community Participation Agreements', *op.cit.*, p39.

63 Smith, D, *The Mutitjulu community participation and partnership agreement*, *op.cit.*, p23.

64 McClure, P, (Chair), *Participation Support for a more equitable society: Final report of the reference group on welfare reform*, Department of Family and Community Services, Canberra, July 2000, p42.



Participation as defined within the Mutitjulu model includes people's participation in everyday cultural, social and economic activities in the community, at individual, family and community levels, including regional family and community networks. Participation activities are to be meaningful and flexible, and potentially the Program could facilitate a range of activities geared towards greater participation, community and capacity-building, including coordinated vocational and life-skills training; intensive individualised assistance and participation; development of a skilled and job-ready labour pool; and support for individual and family financial management.⁶⁵

The 'all-in one-in' participation model put forward in the Report includes both active participation and tailored assistance to certain categories of participants. All able-bodied adults under 49 years and in receipt of unemployment payments for more than six months are to undertake some form of participation. Parenting requirements are to be subjected to a range of progressive requirements, and it is possible that Disabled Pensioners might also be included in the Program. This is with a view to accommodating petrol sniffers, who make up around 10 per cent of Disabled Pensions recipients, as there is 'a strong view expressed at Mutitjulu that disabled people, especially petrol sniffers, could greatly benefit from inclusion within the Program, including both participation and assistance tailored to their particular circumstances and capacities'.⁶⁶ The tailored assistance strategy component enables those in receipt of social security incomes:

on the basis of age, disability, frailty, ill-health or caring duties, or who are already undertaking voluntary responsibilities ... [to] be provided with tailored assistance to support them undertaking existing responsibilities.⁶⁷

This will give recognition to the contributions that they are already making to personal, family and community well-being.

In addition, participation is being defined by this model:

... not only as a practical contribution, via a range of locally-defined activities, in exchange for income support (that is, as an obligation), but also as a form of local-decision-making, policy formulation and service delivery: that is, participation is seen to be about community management of welfare. It is likely that every remote community considering the possible development of an Agreement, will take a similarly wide view of what constitutes participation.⁶⁸

Delegation under the Social Security (Administrative) Act 1999

'All-in one-in' participation within the Program would require negotiation of an Individual Participation Agreement (IPA) with each person which is then signed by the participant and Council delegate. Currently under sections 605(1) and 544(1) of the *Social Security (Administrative) Act 1999* (SSA) all Newstart and Youth Allowance customers must be informed of the requirement to enter a

⁶⁵ *ibid*, pp48-9.

⁶⁶ *ibid*, p32.

⁶⁷ *ibid*.

⁶⁸ Smith, D, 'Community Participation Agreements', *op.cit*, p44.



Preparing-for-Work Agreement. Mutitjulu residents would be required to enter an IPA through the community Program. The ATSIC Report recommended that the Community Council be:

given a delegation, under the *Social Security (Administrative) Act 1999*, to directly deliver agreed welfare services and income support payments to all persons receiving or eligible for them.... [which] will need to include authority to negotiate, approve, monitor and enforce Individual Participation Agreements, and to impose community stages of breaching and appeal linked to Centrelink procedures ... [and] would need to proceed via a newly created community position of Participation Program Manager who would be employed and directly responsible to the Council.⁶⁹

Such a delegation could be made under s234(1) of the SSA, and would be consistent with the 1991 amendments to the Act, which 'state that in its administration, the Secretary is to have regard to, among other things, "the need to be responsive to Aboriginality and to cultural and linguistic diversity"'.⁷⁰ The Report argues that the CPA initiative presents a more responsive policy approach to meeting the needs of the Mutitjulu community and will be most effective if supported by the existing legislation.

In addition, the 'all-in one-in' model requires Centrelink to lift the 'remote community exemption'. This exemption 'removes the requirement to impose any activity testing on Anangu social security recipients resident at Mutitjulu and elsewhere', to offset the specific difficulties faced by remote communities in complying with requirements for receipt of Centrelink allowances.⁷¹ As it stands, the remote community exemption presents a form of 'reasonable differentiation', which is the CERD Committee's term for differential practices or treatment adapted to the circumstances of a particular racial group that are not able to be characterised as 'special measures' but do not constitute racial discrimination.⁷² Removing the remote community exemption will mean that compliance measures (in this instance, developed in conjunction with the community) can be applied by the Community Council via its delegate in ways that are relevant and responsive to local circumstances. The implementation of compliance measures authorised by the community would be facilitated by the proposed delegation to be made under s234(1) of the SSA.

In some respects, the coercive aspect of the model – the requirement to fulfil certain participation activities in exchange for social security entitlements – follows the precedent set by the CDEP scheme as a form of income support with reciprocation. Like the CDEP scheme, the CPA initiative has developed

69 *ibid*, p42.

70 *ibid*.

71 *ibid*, p33. See Sanders, W, *Unemployment payments, the Activity Test and Indigenous Australians: Understanding breach rates*, research monograph no. 15/1999, CAEPR, Canberra, 1999.

72 In its general recommendation XXIV the CERD Committee observes 'that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention are legitimate.' Cited in Race Discrimination Commissioner, *The CDEP Scheme and racial discrimination*, Commonwealth of Australia, Canberra, 1997, p41.



from a similar context, in response to requests for alternatives to 'sit-down' money by a remote community. The Report suggests that the community's leaders and elders will use breaching as a means of putting the brakes on the excesses of welfare dependency, and for potentially reinstating more appropriate values and lines of authority.⁷³ In comparison to the CDEP Scheme, the CPA initiative presents an increased level of coerciveness with its requirement that all able-bodied social security participants below the age of 50 subscribe to the Program, though with very different requirements set out for the various categories and ages of welfare recipients. This coerciveness is to be offset by the initiative's adaptive elements: the emphasis on 'participation' as a community value, the sensitivity to the specific, local circumstances of participants, and the customising of active participation and tailored assistance to certain groups within the community.

The establishment of equitable participation and ownership by the community is imperative to the ethical success of this initiative, as well as the development of a compliance system that is genuinely responsive to the community's circumstances. There is scope for this to occur within the proposed model. As the Report states:

... the people at Mutitjulu desire to participate not only in a program of activities, but in the *choice* of activities, in benefits of the program, in the *implementation and planning* of the program, in decision-making about program objectives and guidelines, and in *monitoring and evaluating* outcomes.⁷⁴

An equitable community process that ensures individual rights and entitlements could be implemented through such features as: ongoing community consultation and education about the program; flexibility to apply measures according to individual circumstances;⁷⁵ personalised support and dispute resolution in response to non-compliance; reporting of all approved breaches approved to the Community Council and to Centrelink; and the right to appeal through community-based mechanisms to the Council delegate, and beyond the Council to Centrelink, the Administrative Appeals Tribunal or an independent arbitrator.

The development of this initiative with a view to establishing strong community governance structures in the future is emphasised.⁷⁶ In addition, any surplus income acquired as a result of breaching processes might be retained in a community fund and directed towards such purposes as community development and family well-being.

73 An earlier report on the Mutitjulu community comments: 'There is a sadness and helplessness experienced by many of the older generation... which has grown in response to a perceived inability to influence and take control of the future of the community and provide something better for the next generation.' Durnan, B, and Wynter Hill Consulting Team, 'The red plan. A training and employment plan for the Mutitjulu Community Council, Uluru,' unpublished report to the Community Council Mutitjulu, 1997, quoted in Smith, D, *The Mutitjulu community participation and partnership agreement*, *op.cit.*, p19.

74 *ibid.*, p25.

75 The Report states: 'from no compliance requirements for the aged and disabled, through to full monitoring of compliance for others.' *ibid.*, p56.

76 *ibid.*



Breaching

The use of breaching as a means of increasing participation should be handled with sensitivity as its effectiveness is still being contested. In the interests of establishing equity there need to be clear commitments (at the very least) from other national and local 'partners' to ensure their compliance with the model and support for Anangu aspirations, to make good the Report's claim that '[a]s equal partners with the community, government and local agencies are in fact seen as being another class of participants'.⁷⁷

Other contextual factors that require attention are the difficulty of sustaining a unified, whole-of-community approach, given the heterogeneity and mobility of the Mutitjulu community residents, and the need for separate initiatives to target other (if inter-related) problems beyond the scope of the model such as family breakdown and substance abuse.

To date the practice of breaching has a track record for further disenfranchising already disadvantaged groups such as Indigenous people and youth.⁷⁸ However, the customising of compliance measures to suit the culture and circumstances of individual Indigenous communities through the CPA initiative presents an opportunity for achieving improved outcomes in terms of participation and reduced breaching rates. The transfer of authority for compliance management to the local level also has 'a potential role to play in devolving jurisdictional areas of welfare service delivery and policy to community management, in a collaborative partnership between communities and government'.⁷⁹

Time-frame

Equitable participation by all partners should be further reinforced by ensuring that the model is applied to meet assessable goals and objectives over a prescribed time-frame. The Report puts forward fifteen goals indicative of the outcomes the community wishes to achieve through participation in training, employment and other participation activities consistent with their social, cultural, and economic circumstances and values. While some of these goals, such as reforming community governance and capacity-building, can be linked to a long-term vision for the community, it is important that any projected outcomes be assessed against a prescribed time-frame for achieving equity for the group.

Otherwise, the model stands to repeat the more negative aspects of the CDEP scheme as a 'lifetime destination' without achieving any further degree of self-determination, self-management, community development or governance. There would need to be clarity about what form of commitment various partners are prepared to make, particularly in regard to the implementation of the model over a period of time and the level of resources required, and careful monitoring of all partners' participation as well as the flexibility to make any necessary re-adjustments to the model.

77 Smith, D, *The Mutitjulu community participation and partnership agreement*, *op.cit*, p25.

78 See discussion in Chapter 2. For further information, see ACOSS, 'Breaching the safety net: the harsh impact of social security penalties' ACOSS Info 305 www.acoss.org.au/info/2001/305x.htm (14 December 2001).

79 Smith, D, 'Community Participation Agreements', *op.cit*, p42.



There also needs to be a commitment from government beyond the 4-year funding period of Budget 2001's welfare reform package to ensure the effectiveness of the initiative, such as the 5-10 year period proposed by the Report, which observes that:

The recent government announcement that ATSIC will undertake the development of some 100 Community Participation Agreements has been made in the absence of any underlying program support for the initiative. The mooted Agreements will require a range of service and program support that is currently distributed across different departments and agencies. Immediate coordination and planning is needed at the national level...⁸⁰

Transferability of the model to other communities

A further issue raised by the model is that of its transferability to other contexts. Certain elements of the Mutitjulu model such as the changes to the SSA and government policy have broader implications for other potentially participating communities. In the interests of achieving effective participation, it is essential that flexibility in design of CPAs be promoted and that no one model should become prescriptive or definitive. While some remote Indigenous communities share similar economic opportunities to the Mutitjulu community, there are other communities that may require even greater support from government in order to achieve worthwhile outcomes.

ATSIC has stated that this constitutes a challenge at the level of planning for specific community initiatives:

In developing plans, there needs to be an understanding of the physical, political, economic and social environment relevant to the plan, and an assessment at every stage of the capacity of the 'individual' and 'community' to participate/own the plan. That is, a capacity building plan has to be defined with sustainable goals laid out within realistic and acceptable time frames.⁸¹

Consideration might also be given to adapting the CPA initiative for other areas, such as rural and urban, in the way that the CDEP Scheme has been translated to contexts other than the remote area where it had its origins. There are also prospective linkages with other initiatives such as the Queensland government's Ten Year Partnership with Indigenous communities, the Family Income Management trials developed with Noel Pearson and other capacity building initiatives supported through the Stronger Families and Communities Strategy, as well as potential for communication with others involved in the evolution of other similar models and agreements. Another appropriate linkage would be for ATSIC to consider the CPA initiative in conjunction with any Indigenous governance arrangements emerging through its work on regional autonomy.

One of the most positive aspects of the Mutitjulu model is the potential level of choice it presents as an adaptation of a government policy initiative in which Indigenous people are able to some degree to direct policies and programs to

80 *ibid*, p67.

81 *ibid*, p3.



achieve specific outcomes that will effect change to their circumstances. The Agreement model adapts and capitalises on elements of the government's approach to welfare reform such as increasing participation at the community level and 'facilitating direct involvement by community-based providers in "a key role in the whole gamut" of "policy advice, programme design, programme implementation and service delivery"' to offer specific, culturally and locationally-sensitive and flexible solutions to the Anangu's welfare and employment issues.⁸²

While each community participating in the CPA initiative will want to tailor Agreements to suit their own local circumstances, they will inevitably also have to address the same core issues with respect to welfare reform concerning administrative and funding frameworks, and procedural arrangements. It is likely that some of the same overarching solutions being considered by the Mutitjulu Community will be relevant and transferable.

One concern this approach raises is whether the dominant public policy paradigm of welfare reform with its values of mutual obligation and self-reliance might inevitably overshadow the cultural and traditional values held by the community including the degree of self-determination ascribed to the notion of participation. In addition, if the CPA initiative is really to be of value to Indigenous communities, measures should be taken to ensure that it does not repeat or embed the longstanding difficulties accompanying the community services model and that instead, equitable participation by all partners is guaranteed, and strategies for progressing effective forms of capacity-building and governance over the long term that further Indigenous self-determination are implemented.

Whatever the future level of success of the CPA initiative, Indigenous people should not be restricted to one model as a means of pursuing greater autonomy and control over their affairs. Other initiatives for furthering Indigenous capacity and governance, including those based in native title, should also be encouraged.

Yenbena Indigenous Training Centre

Yenbena Indigenous Training Centre is located at Barmah near Echuca in northern Victoria. It provides an example of best practice in relation to increased and targeted employment and training outcomes for Indigenous people, community participation and capacity-building.⁸³

Yenbena is an initiative of the Yorta Yorta Nation Aboriginal Corporation (YYNAC), the Australian National Training Authority (ANTA) and the Victorian Aboriginal Education Association Incorporated (VAEAI). It is informed by the commitment of the Yorta Yorta people to self-determination at the local level, which they have also pursued through a native title application over their country.

The Yorta Yorta Aboriginal Community has in excess of 4,000 people, and their determination area covers 2,000-3,000 square kilometres of crown land from

⁸² *ibid*, p27.

⁸³ Material for this section was provided through discussions and consultation with representatives from Yorta Yorta Nation Aboriginal Corporation, VicRoads and Rumbalara Aboriginal Cooperative.



both New South Wales and Victoria in the mid-Murray region. The area 'represent[s] less than 10 per cent of what Yorta Yorta consider is theirs by tradition... [it is] a patchwork quilt of public lands and waters within their traditional territorial boundaries'.⁸⁴ The traditional rights to country encompassed by Yorta Yorta native title comprise 'rights to possession, occupation, use and enjoyment of the determination area, the waters, and natural resources'.⁸⁵

On 18 December 1998 Olney J determined that native title did not exist in relation to the lands and waters in the determination area, against which the Yorta Yorta filed an appeal five weeks later. The Appeal was dismissed by a two to one majority of the Full Court of the Federal Court on 8 February 2001. Special leave to appeal to the High Court was granted on 14 December 2001. This sequence of events has not deterred the Yorta Yorta Aboriginal community from seeking to exercise their traditional rights and culture, most recently through local arrangements in relation to employment and training in addition to their native title application.

Yenbena Indigenous Training Centre, which has been in operation since March 2001, has been established by YYNAC through drawing on a mixture of Commonwealth and State funds to provide targeted and culturally appropriate training to Indigenous young people. Essentially this initiative seeks to 'fill the gaps' where the Commonwealth is not providing appropriate funding or programs to meet Indigenous employment needs.

The view of the Yorta Yorta Aboriginal community was that Commonwealth programs such as Work for the Dole and CDEP do not at present provide adequate skilling and mentoring for successful transition from mutual obligation-type activities to employment. Some frustration was expressed with the tendency of CDEP to obscure rather than genuinely address Indigenous unemployment need.

As an alternative, the community sought funding from the Community Jobs Program, a Victorian government Employment and Skills Policy initiative, with a view to tailoring a training program to meet their own needs. The program is aimed at 'breaking down the employment barriers that prevent people from gaining employment, particularly in communities that are disadvantaged and/or are in areas of high unemployment'.⁸⁶ It funds not-for-profit incorporated community-based organizations, local governments, federal/state government agencies, statutory authorities and regional development organizations to employ local jobseekers on community projects.

Projects are to employ 12 or more jobseekers aged 15 years and above, and must provide community benefit. Training is to be delivered by a Registered Training Organisation (RTO) and sponsor organization. Sponsor organizations must 'ensure that prospective participants have been unemployed for more than 6 months during the last 12 months or are unemployed and are "at risk" of

84 Arnold Bloch Leibler, 'Briefing paper on the Yorta Yorta native title determination application', unpublished paper, para 2.

85 *ibid*, para 4.

86 Department of Education, Employment and Training (DEET), State Government Victoria, *Community Jobs Program Guidelines*, July 2001, para 1.1. The Program targets Aboriginal or Torres Strait Islanders as a long-term unemployed group.



long-term unemployment'.⁸⁷ It is not necessary for unemployed participants to be registered with a Job Network provider or to be receiving assistance from Centrelink, although those who are receiving Job Search Training or Intensive Assistance from a Job Network provider are eligible for the Program. Grant funds are to be used as a contribution towards wage and associated costs of participants and supervisor/s, with sponsor organizations covering further costs through covered through contributions or other means.⁸⁸ Support is available for 2-3 years development of the program.

Yenbena was registered as an RTO with YYNAC as a sponsor organization under the State Training Board of Victoria.⁸⁹ Registration involves proving that the sponsor organization is capable of delivering training, including meeting a minimum performance standard, ensuring payment of participants under the appropriate award and receipt of relevant benefits and allowances, and compliance with all legislative requirements. The organization must also purchase nationally-recognised training courses, some of which are state-owned (such as Certificate I in Koorie Education and Certification III in Aboriginal Site Conservation).

Currently the Training Centre offers the following courses within a twelve-month period: Coorong Tongala (Koorie Education), Business (Office Administration), Business Administration, Community Work, Horticulture, Agriculture, Site Conservation, Horticulture, and Assessment and Workplace Training. The courses were purchased in response to the needs for training and mentoring identified by the Yorta Yorta Aboriginal community, and as a result of targeting the local resources available for providing employment and training opportunities. For example, business administration courses were introduced to cater for identified needs for training in administration, information technology and literacy skills in local organizations; site conservation was linked to an agreement with VicRoads for the Yorta Yorta to monitor country during VicRoads works.

All training modules are linked to placements and each employee has a pathway in which future jobs are identified.⁹⁰ The program also provides an opportunity for those who may have had some work experience (such as casual office work in a community organization) to receive formal accreditation for their skills.

Yenbena is more like a flexible learning centre than a training centre, and it makes use of community venues and non-institutional atmospheres. Only specific training (mainly administrative) takes place within the Centre itself; most time is spent in placements. It uses a work-based learning model with 'hands-on' training that links groups to different community organizations. Groups are small (no greater than 4 participants) which offers increased opportunities for mentoring and participation.

87 *ibid*, para 3.6.

88 *ibid*, para 7.1, 7.2.

89 The Yenbena building itself has been funded through Australian National Training Authority and Victorian DEET Projects and Programs.

90 CJP requires that: 'Work experience provided to the project participants is to be integrated with the provision of accredited skill development and linked to ongoing employment opportunities.' DEET, *op.cit*, para 1.12.



The flexibility of the program enables the Yorta Yorta Aboriginal community to integrate cultural knowledge with training for participants without having to create a separate opportunity. For example, courses (such as communication skills, business administration and community work) can be customised to suit the local context and provide culturally-specific training. All staff, students and mentors at Yenbena are Indigenous, and training seeks to draw on community support networks and values. Integral values are the importance of working and training as part of a community, and learning as a 'natural way of life'. Elders also play a significant role through participating as trainers and mentors. Yenbena training arrangements operate on a trust basis, and are underpinned by the community's support for the younger generation's participation and development. 'Breaching' and other forms of compliance are not applied - while the majority of participants have been previously unemployed or are school leavers, none are in receipt of a social security allowance - and the community does not have any plans to develop measures to ensure participation. Fees for participants are currently waived, so youth who are asset- and skills-poor are not financially burdened.

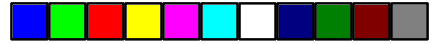
To date, 8 out of 12 participants have found employment, one as a ranger for Parks Victoria. Although participants are able to seek outside employment, it is envisaged that skills learnt will be invested back into the community - for example, through employment within existing organisations and arrangements or through future enterprises.

One of the perceived advantages of the Community Jobs Program is its adaptability and the opportunity this provides to empower people to look after their own community. The Program encourages the development of projects linked to other infrastructure related initiatives funded by the State or Federal Government,⁹¹ and it is envisaged that future courses will be developed that build linkages with other enterprises in the area such as aquaculture, hospitality and tourism. The idea is that Yenbena will enable YYNAC to 'care for the mob' by developing an economic base, and become an incubator for getting into small business and enterprises along family lines, and in doing so, provide a model for other Indigenous groups. Existing properties owned by YYNAC may also be utilised for training and business enterprises as well as non-profit community activities such as retreats for elders and youths.

Some of the impetus for establishing the training program came from an agreement between VicRoads, Rumbalara Aboriginal Cooperative and the Yorta Yorta Nation Aboriginal Corporation (the 'Murchison East Deviation Project Agreement - Cultural Heritage and Environment') that relates specifically to cultural heritage management and the monitoring of country where road works are taking place. This Agreement acknowledges the Yorta Yorta peoples' 'right to protect Yorta Yorta Cultural Heritage, their affinity with and relationship to the land, and their interest in the protection of the Environment'.⁹² The agreement also provides finances for monitoring services: under the Agreement YYNAC is to appoint a suitable number of representatives to act as monitors for the project,

91 *ibid*, para 1.11.

92 Murchison East Deviation Cultural Heritage and Environmental Agreement, between VicRoads and Yorta Yorta Nation Aboriginal Corporation, unpublished, 3 May 2001, preamble.



and fees are payable to YYNAC 'for all consultation, monitoring and work of relevance to the Agreement, carried out for and on behalf of it by any and each of its representatives', as well as administration fees.⁹³ This provides a training and employment pathway for Yorta Yorta people through its linkage to Certificate III in the Aboriginal Site Conservation offered by Yenbena Training Centre. It also creates an opportunity for elders in the community to pass on their cultural knowledge to a younger generation.

The VicRoads Agreement includes weekly meetings between VicRoads and YYNAC, and the delivery of cultural awareness training by YYNAC to relevant VicRoads employees and contractors. There is a further arrangement between YYNAC and Rumbalara Football and Netball Club (Rumbalara Aboriginal Cooperative) for the Club facilities to be used to support training and lease a vehicle. This arrangement was initially supported by Koori Economic Employment training Agency (KEETA) and seeded with funds from DEWRSB's Structured Training and Employment Projects ('STEP') initiative which provides 'flexible financial assistance for projects [between private sector employers and Indigenous communities] that offer structured training for 5 or more people'⁹⁴ over a 12-month period - in this instance, support for providing equipment, clothing, mentoring and evaluation.

YYNAC hope that the VicRoads Agreement will set a precedent for other Indigenous people, agencies and stakeholders for making agreements about Indigenous interests in Victoria, and in doing so, create further employment pathways.⁹⁵ While the current Victorian government has advocated a 'whole-of-government' approach to Aboriginal affairs, including cultural heritage, the Yorta Yorta community claim that it has had little impact, that the majority of government departments are yet to participate in this approach and that agreements are currently a more effective way of responding to developments.

The Agreement also provides a vehicle for recognition of the Yorta Yorta Aboriginal community's traditional rights and interests in the area. This initiative is grounded in their native title application, which has been a rallying point for the Yorta Yorta in the area - one comment made by elders in reference to the development of the community's employment and training initiatives was 'without native title, we may not have been there'.

The VicRoads Agreement and the Training Centre both come under the jurisdiction of the Yorta Yorta Council of Elders. The Yorta Yorta Nation Aboriginal Corporation is a prescribed body corporate as defined in the *Native Title Act 1993* and its regulations, which was established in November 1998 under the *Aboriginal Councils and Associations Act 1976*. Within the Corporation, the Council of Elders comprising representatives from the sixteen traditional Yorta

93 *ibid*, para 24.1.

94 Indigenous Employment Policy, www.workplace.gov.au/Indigenous.asp (29/10/01), pp2-3.

95 To date, YYNAC has made three other agreements with Gas Corp, Goulburn Murray Waters and Murray Goulburn Dairy. They recently participated as a member of the Murray and Lower Darling Indigenous Nations Confederation in an All of Nations Agreement with the Department of Waters, NSW, and the Murray Darling Basin Commission, signing off on plans for water and resource management. The Murray and Lower Darling Indigenous Nations Confederation permits individual Indigenous groups to determine their own activities in their particular area.



Yorta family groupings plays a key role in decision-making processes, particularly those relating to native title rights and interests. A separate Governing Committee based on the same representational lines is responsible for the Corporation's administrative functions and reports to the Council of Elders. Both the Council of Elders and the Governing Committee are able to appoint subcommittees relating to the management of specific issues – the Yenbena Training Centre, for example, has a subcommittee of elders, community representatives and specialists that reports jointly to the Governing Committee and the Council of Elders.

The local Aboriginal community organisations of Rumbalara Aboriginal Cooperative in the Shepparton district and Njernda Aboriginal Corporation in the Echuca district are responsible for the protection of cultural heritage matters within their districts. Both these organisations have acknowledged the Yorta Yorta Council of Elders as having the traditional role in speaking for country and respect all decisions made by the Council of Elders. This arrangement links the section of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Section 21 Part IIA) relevant to cultural heritage in Victoria to the traditional interests in country represented in YYNAC. While this Act 'acknowledges Aboriginal people in Victoria as the rightful owners of their culture and heritage and consequently provides legislative entitlement to their full control and management of decisions affecting this heritage',⁹⁶ the areas and bodies designated for protection of cultural heritage do not necessarily operate in accordance with traditional affiliations.⁹⁷

YYNAC has been able, however, to protect the traditional interests of the Yorta Yorta peoples it represents and create further employment opportunities through the administrative arrangements it has developed as a prescribed body corporate and through the development of protocols with the local Aboriginal Cooperatives.

YYNAC's employment and training arrangements are a response to current shortfalls in coordination of Commonwealth and State agencies and services, and the lack of definite employment pathways provided by existing Commonwealth programs. It is also a model that draws consciously on Noel Pearson's philosophy of reciprocity – the Yorta Yorta Aboriginal community are supportive of his articulation of community participation and self-determination - and is geared towards the development of social entrepreneurship and venture philanthropy in the near future.

Moreover, the grounding of Yenbena in the Yorta Yorta Aboriginal community's traditional interests in country and self-determination provides an integral source of identity and cohesion for this initiative. While this initiative is creative, self-directing and enterprising, its deployment of a patchwork of funding to achieve its goals reflects the (time and energy intensive) predicament of many Indigenous

96 Finalyson, J, 'Indigenous heritage protection, native title and regional agreements: the changing environment', discussion paper no. 145/1997, CAEPR, Canberra, 1997, p5.

97 While the National Native Title Tribunal does not recognise YYNAC as holding native title interests on trust for the Yorta Yorta peoples due to the current status of the Yorta Yorta native title application, the corporation continues to receive future act notifications from time to time through means other than from the Tribunal.



organisations and communities in doing the rounds of government and other funding bodies.

Indigenous groups and communities should be free to pursue self-determination and self-government through the governance arrangements they find most appropriate to their circumstances. They should not be limited to whatever policy prescriptions for 'self-determination', 'self-reliance' or 'participation' are in vogue but be able to determine what forms of representation, structures and processes are suitable to their particular group's needs and distinct characteristics. However, as noted earlier in this chapter, there is a role for government to play in resourcing the development of any new Indigenous governance arrangements including a case for the centralised transfer of resources to communities and regions by Commonwealth agencies for the purposes of community development and increased governance. The conditions for receipt of any transfer of resources should in turn be responsive to the needs and aspirations of specific Indigenous groups for self-sufficiency and self-determination. In the Canadian context the transfer of resources has been linked to the recognition of native title rights and Indigenous self-government. In the face of growing interest within the Australian context in the potential for increased Indigenous governance and capacity-building, it is important not to lose sight of the place of the exercise of traditional rights and culture and the need for any new governance arrangements to be accompanied by recognition of the jurisdictional responsibilities, distinct rights and status of Indigenous peoples.

Governance and capacity-building – Future challenges

The need for effective remedies and participation by Indigenous people in addressing longstanding disadvantage through such means as capacity-building and self-governance is justly receiving greater attention. Consideration of these strategies, particularly as part of the reconciliation process, requires that further recognition and commitment be given to the long-term nature of these processes, through the adoption 'on a whole of government basis, [of] long-term policies that identify overcoming Aboriginal and Torres Strait Islander disadvantage as a national priority'.⁹⁸

Substantial long-term commitments that provide a framework for progressing some of the outstanding issues facing Indigenous people, as well as providing recognition to the distinct position and status of Indigenous peoples have been largely absent from the relationship between Indigenous and non-Indigenous peoples. Their implementation is long overdue.

Partnerships between Indigenous and other stakeholders have become an accepted part of government policy for promoting better outcomes in service delivery. However, in order for there to be substantial progress in the 'reconciliation relationship', these arrangements need to be equitable in so far as they recognise and respond adequately and progressively to the historically-derived disadvantage experienced by Indigenous peoples.

98 Recommendation 1 of last year's *Social Justice Report 2000*, p130.

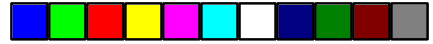


If welfare reform is to provide greater opportunities for Indigenous participation, then government must take the need for reform of existing funding and administrative arrangements seriously. It must recognise the part the current community services model has played in generating Indigenous welfare dependency and move beyond this to find ways of developing and resourcing Indigenous capacity-building and governance arrangements that will provide an adequate basis for economic development and self-sufficiency. In doing so, it must also take up the challenge of facilitating rather than repressing the recognition of the specific characteristics and aspirations of Indigenous cultures and societies in Australia. As ATSIIC's Rights Framework states:

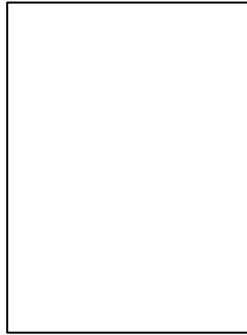
Properly constructed grounded governance mechanisms will facilitate credible decision making processes that will withstand scrutiny and consolidate the authority of the individual, family and community in matters of significance. They will also reflect a cohesive approach amongst members of particular groups in matters of mutual interest without compromising our right to self-determination. Further, such governance mechanisms will assist in the development of processes and structures that enable self-government arrangements and promote regional autonomy in decision making processes and service delivery.

Aboriginal and Torres Strait Islander peoples assert our right to self-determine the governance structures of our communities.⁹⁹

⁹⁹ ATSIIC, 'Our rights: our lives: our way: ATSIIC rights framework', National Policy Office, Canberra, June 2001, p16.



**The criminal justice system –
mandatory sentencing and juvenile
diversion in the Northern Territory
and Western Australia**







Chapter 4

101



Laws mandating minimum terms of imprisonment ('mandatory sentencing') and Indigenous people

Introduction

On 13 April 2000, the Senate requested the Human Rights and Equal Opportunity Commission to inquire into all aspects of the agreement between the Northern Territory Government and the Commonwealth regarding the Territory's mandatory sentencing regime; the consistency of mandatory sentencing regimes with Australia's international human rights obligations; and Western Australia's mandatory sentencing regime.¹

On 3 May 2000, I wrote to the President of the Senate confirming my intention to conduct the following project over the next 12 months:²

- assess the continued impact of mandatory sentencing laws in the Northern Territory and Western Australia on Indigenous Australians;
- assess the impact on Indigenous Australians of the additional discretion placed in the Northern Territory Police through the deal with the Commonwealth; and
- develop a methodology against which to assess the appropriateness and success of diversionary schemes in the Northern Territory and Western Australia, and assess these schemes on this basis.

The project involved targeted research including the collection of statistical information and an analysis of legislation on mandatory sentencing and juvenile diversion in the NT and WA. As the NT diversion scheme is relatively new, it was essential to conduct interviews and meetings with relevant people in the NT to gain an understanding of the operation of the scheme in practice. We interviewed lawyers, police, correctional services, community leaders, program coordinators, youth workers and young offenders in the Alice Springs region, Darwin, Tennant

1 Senator Grieg, the Hon B, *Hansard*, Senate, 13 April 2000, p14033.

2 In this letter I provided a preliminary assessment of the WA and NT schemes.



Creek, Katherine and Groote Eylandt. In the WA, we commissioned a researcher, who held meetings with officials of the Department of Juvenile Justice, police, Aboriginal Legal Service, children's legal service, Juvenile Justice Teams and young Indigenous offenders at two juvenile detention centres.

During the course of the project, we also developed a set of human rights principles for the conduct of best practice diversion of young offenders, drawing on relevant human rights treaties and standards. These have been published in a Human Rights Brief on best practice principles for the diversion of juvenile offenders (see below).

The next two chapters report the outcomes of this project. In this chapter I examine mandatory minimum imprisonment regimes (or 'mandatory sentencing' laws) in the Northern Territory (NT) and Western Australia (WA) and various changes to the operation of the laws in the last year. The next chapter then examines the Juvenile Pre-Court Diversion Scheme introduced in the NT as part of the mandatory sentencing deal, as well as diversionary options for juveniles in WA and, more briefly, schemes operating in other Australian jurisdictions.

The newly elected NT government repealed mandatory sentencing laws on 18 October 2001. Despite this, a review of the impact of the laws remains pertinent for a number of reasons. First, mandatory sentencing laws continue to operate in WA. Second, there is a risk that mandatory sentencing laws will continue to be considered and introduced in Australia despite various arguments against their use. The recent introduction of mandatory sentencing for people smugglers by the federal government, despite their public opposition to the NT laws, is a case in point.³ Similarly, an examination of mandatory sentencing laws highlights the continuation of systemic discrimination against Indigenous people in criminal justice processes in Australia.

Overview of minimum mandatory imprisonment laws

The Northern Territory laws

In 1996 the NT Government introduced laws which established mandatory minimum periods of imprisonment or detention for adults and juveniles found guilty of certain property offences. The legislation was intended to implement a platform of zero tolerance on crime, particularly theft. The laws have commonly been referred to as 'mandatory sentencing' provisions, although this does not fully convey the gravity of the provisions which can more appropriately be described as mandatory minimum terms of detention or imprisonment.⁴

The *Juvenile Justice Act 1983* (NT) provided compulsory minimum sentences of detention of at least 28 days for children aged 15 and over who are convicted

3 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), s233(c). Under the Act, first time 'people smugglers' receive a mandatory minimum five years and repeat offenders eight years, up to a maximum of 20 years.

4 The heading of the relevant division in the adult legislation is 'Minimum Mandatory Imprisonment for Property Offences'. The heading forms part of the legislation for interpretative purposes: *Interpretation Act 1978* (NT), s55(1).



of certain property offences for a second or subsequent time unless diverted by the Court to a program approved by the Minister.⁵

The offences covered by the provisions were stealing (other than shoplifting); robbery; assault with intent to steal; unlawful entry; unlawful entry with intent; being armed with intent to enter; unlawful use of a vessel/vehicle; receiving stolen property; receiving to obtain reward; criminal damage; and possession of goods suspected of being stolen.⁶ In addition, if a shop issued a trespass notice against a customer and that person was subsequently found guilty of stealing from the shop, the offence attracted a mandatory minimum term.⁷

The property offences attracting mandatory terms of imprisonment for adult offenders were the same as for young people,⁸ although the system of 'strikes' or convictions worked differently. For a first offence an adult had to be sentenced to imprisonment for at least 14 days. This rose to a minimum of 90 days imprisonment for a second offence and a minimum of 12 months imprisonment on each subsequent occasion.⁹ For both juveniles and adults, mandatory terms could not be served concurrently with terms of imprisonment imposed for non-property offences or for mandatory terms imposed on another day.¹⁰

These provisions were slightly ameliorated for adults in 1999 with the introduction of 'exceptional circumstances' provisions. These provided that defendants before the court for a single property offence that was trivial in nature could have a non-custodial penalty imposed on them if they could prove that they cooperated in the investigation of the offence; that there were mitigating circumstances (other than intoxication); that the offence was an aberration from their usual behaviour and that they were otherwise of good character and had made efforts towards restitution. A sentence imposed under the exceptional circumstances provisions did not amount to a 'strike' for the purposes of the mandatory imprisonment provisions.¹¹ The exception is only available once to each defendant from the date the provisions commenced.

One of the most remarkable features of the mandatory minimum imprisonment regime was the manner in which the same minimum term was imposed for a diverse range of offences regardless of how trivial or serious the offence. This is illustrated by the list of maximum penalties in the table below.

5 *Juvenile Justice Act 1983* (NT), s53AE(2). The maximum custodial sentence that can be imposed is 12 months: s53AE(10)(b). See Chapter 6 for more information about post-court diversion.

6 *Juvenile Justice Act 1983* (NT), Schedule 1.

7 Both the *Sentencing Act 1995* (NT) and the *Juvenile Justice Act 1983* (NT) provide that stealing offences are 'property' offences if the defendant is on retail premises unlawfully. Trespass notices are issued under s9 of the *Trespass Act 1987* (NT) and are written confirmation that the person has been warned not to return to the premises. Anecdotal evidence suggests that trespass notices are regularly issued to people who are not alleged to have committed an offence in the shop.

8 *Sentencing Act 1995* (NT), Schedule 1.

9 *Sentencing Act 1995* (NT) ss78A(1)-(3).

10 *Juvenile Justice Act 1983* (NT) s53AE(9) and *Sentencing Act 1995* (NT) s78A(6A); cf s52(1). 'Strikes' accrued according to the number of sentencing days rather than the number of offences. In other words, if a defendant was before the court for sentence on a particular day for three offences each committed on a different day that amounted to one 'strike' for the purposes of the mandatory imprisonment provisions.

11 *Sentencing Act 1995* (NT) s78A(6B)-(6C), (6E).



Table 1 Maximum penalties for offences attracting mandatory imprisonment in the Northern Territory

<i>Criminal Code</i>	Maximum ¹²
Section 210 Stealing (other than shoplifting)	7-14 years
Section 211 Robbery	14 years - life
Section 212 Assault with Intent to Steal	14 years - life
Section 213 Unlawful Entry	1 year - life
Section 214 Unlawful Entry with Intent	3 years
Section 215 Armed with Intent to Enter	7 years
Section 218 Unlawful Use of Vessel/Vehicle	2-7 years
Section 229 Receiving Stolen Property	7-14 years
Section 231 Receiving to Obtain Reward	7 years
Section 251 Criminal Damage	2 years - life
<i>Summary Offences Act 1979</i>	Maximum
Section 61 Goods Suspected of Being Stolen	\$2000/12 mths

NT case study¹³

Sara is a 19 year old Aboriginal woman who moves between Alice Springs and bush communities. Sara has been accessing youth services since she was 15 years old. At first referral to crisis accommodation she reported sexual abuse by a number of men. Her chronic petrol sniffing commenced at this time. Other issues Sara identified included family fighting, drinking, and lack of family to stay with. Sara had been notified on nine occasions to Family Youth and Children's Services as a child requiring care. Sara was charged with a property offence in 1997. She had never been in trouble before. The charge related to breaking a car window because she was hungry and needed some money. She was sentenced to 14 days imprisonment.

NT case study¹⁴

A man was taken into protective custody because he was intoxicated.¹⁵ He was not suspected of any criminal activity. The man unpicked the seam on the mattress in the cell while he was sobering up. He was charged with criminal damage which carries a mandatory minimum period in gaol.

12 The ranges within the maximum terms themselves reflect different degrees of aggravation within each offence.

13 Johnson, D & Zdenkowski, G, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory*, Centre for Independent Journalism, Sydney, 2000, p104.

14 This case was related to us in the course of consultations in the NT in July 2001.

15 The *Police Administration Act 1978* (NT), s128(1) enables the police to apprehend people without a warrant if they are intoxicated in a public place and detain them until they are sober. This is referred to by police as protective custody.



The Western Australian laws

Mandatory sentencing or 'three strikes' laws came into effect in WA on 14 November 1996 in the *Criminal Code Amendment Act (No.2) 1996*.¹⁶ The laws were devised initially against a background of community concern about home burglary and were part of a package of changes to burglary offences which included the creation of a new offence of home burglary,¹⁷ an increase in the maximum sentences for home burglary and burglary committed in circumstances of aggravation, and the introduction of a mandatory minimum 12 months imprisonment or detention for repeat home burglary (the 'three strikes' provisions).

For adults, the *Criminal Code (WA)* now requires the court to impose a sentence of at least 12 months imprisonment for a person convicted of home burglary who has previously served a custodial sentence on at least two occasions for home burglary. It expressly prohibits suspension of the term of imprisonment and requires that the calculation of previous offences includes those offences that may have been committed when the offender was a child.¹⁸ There are no exceptional circumstances provisions.

For juveniles (offenders aged 10-17 years inclusive), the WA laws also require a 12 month sentence in a juvenile facility for the third or subsequent strike of home burglary.¹⁹ The laws apply to children as young as ten years of age. Juveniles sentenced under the laws are not eligible for parole until they have served at least six months – or 50 per cent – of their sentence.²⁰ This is in contrast to adults sentenced to imprisonment, who are eligible for parole after serving one third of their sentence.

WA case study²¹

Although the legislation assumes that every offence of home burglary is equally serious, 'home burglary' covers a wide range of circumstances. In one case, a 12 year old Aboriginal boy from a regional area, with a history of welfare intervention, educational problems and substance abuse, was sentenced to 12 months detention for entering a house in company with others and taking a wallet containing \$4.00. His previous burglaries consisted of entering a laundry room in a hotel where nothing was removed and a school canteen where a can of soft drink was taken.

16 Mandatory sentencing legislation has been introduced previously in WA. In 1992 the WA Labor party enacted the short-lived *Crime (Serious and Repeat Offenders) Sentencing Act 1992 (WA)* which targeted high speed pursuits in stolen vehicles. It was shown to have no deterrent effect and was repealed in 1994. See Morgan, N, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?', (2000), 24, *Criminal Law Journal*, pp164-183.

17 The laws apply to burglaries that are committed on places that are ordinarily used for human habitation, including hotel rooms, caravans and tents.

18 *Criminal Code 1913 (WA)*, s401.

19 *Criminal Code 1913 (WA)*, s401(4)(b).

20 *Young Offenders Act 1994 (WA)*, s121(1).

21 Aboriginal Legal Service of WA and the WA State Policy Office of ATSIC, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the provisions of the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*, Submission 47, p5.



The effect of the provisions relating to juveniles has been slightly altered through judicial interpretation. In February 1997, the President of the Children's Court held that the courts have the power to order the juvenile's release on a 12 month Conditional Release Order (CRO).²² Other decisions have seen the Court:

- give credit for time spent on remand and backdating of sentences
- only count convictions as 'strikes' when they occur within a two year period²³
- discount previous convictions as 'strikes' where the Court refrained from giving a penalty under Section 67 of the *Young Offenders Act 1994*.²⁴

Ironically, the WA Government has relied upon the use of CROs by the judiciary to argue that judicial discretion has remained under mandatory detention provisions laws and to differentiate the laws from those provisions in the NT. The Attorney-General in the newly elected Government has stated, for example, that there is:

considerable flexibility in the system as the judiciary could still impose a non-custodial sentence where this was considered more appropriate... If there is a glimmer of hope, the judiciary can still divert them from detention, but in most cases, they represent a real threat to the community that must be addressed.²⁵

The Senate and Legal Constitutional References Committee also saw the use of CROs as a factor that balances the severity of the length of sentences with safeguards with respect to juvenile offenders.²⁶

Such discretion is, however, severely limited. The courts have only two choices for a juvenile: 12 months detention or a 12 month CRO. They are unable to go below the minimum 12 months in either case or to impose a more appropriate order on a particular juvenile. Similarly, juvenile offenders are liable to 12 months detention if they do not comply with the terms of a CRO. This can result in disproportionate outcomes, particularly when it is the child's first experience of detention and/or the child is young.²⁷

The policy of the Children's Court is to use sparingly CROs as an alternative to detention. The President of the Court has prioritised age as the key determinant

22 *The Police v DCJ* (unreported Children's Court of WA), 10 February 1997. In the judgment, the President refers to Intensive Youth Supervision Orders (IYSO). A CRO is a sentence of detention but offenders are immediately released on an IYSO. The judgment has not been challenged on appeal.

23 *'P' (A Child) v The Queen* (CCA 122 of 1997), 4 November 1997, WA Court of Criminal Appeal. As result of this appeal the three dates of conviction for juveniles must be within a two year period. Further, as a result of *R v Herbert William Mackay* (CCA 150 of 1997) on 10 December 1997, an adult's previous Children's Court convictions for home burglary only contribute to current repeat offender status if they occurred less than two years previously.

24 *'G' (A Child) v The Queen* (CCA 121 of 1997), 4 November 1997, WA Court of Criminal Appeal.

25 McGinty, The Hon J, 'Review shows mandatory sentencing targets chronic offenders', Press Release, 15 November 2001. See also Foss, The Hon P, *Hansard*, Legislative Council (WA), 15 March 2000.

26 Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, March 2000, op.cit, p13.

27 Department of Justice (WA), *Review of section 401 of the Criminal Code*, Department of Justice, Perth, 2001, p26.



in assessing an offender's suitability for a CRO.²⁸ Hence they have been mainly imposed for offenders aged 14 years or under.²⁹ There are instances of CROs being imposed for 'exceptional circumstances' such as Aboriginal children stealing food.

The factors taken into account do not fully meet the requirements of either the Convention on the Rights of the Child or the International Covenant on Civil and Political Rights that justice procedures for children should take into account a full range of factors, especially the desirability of promoting the child's reintegration and rehabilitation. For example, between the end of 1997 and October 1999, the Children's Court refused to order a CRO in 15 matters involving young Indigenous people where it was identified that they all had multiple problems arising from substance abuse, lack of accommodation and family breakdown.³⁰

The former WA Government has stated that this type of judicial discretion in relation to juvenile offenders was not the intention of the legislation. When the first judgment on CROs was made, the WA Government foreshadowed legislative change to close this discretionary 'loophole'. They have since tolerated it only because the judiciary was seen to be 'exercising its discretion in a responsible and appropriate manner'.³¹

The WA laws continue to place significant restraints on judicial discretion in relation to juvenile offences, leading to outcomes that do not adequately take into account the best interests of the child.

Distinguishing minimum mandatory imprisonment laws from other mandatory sentencing provisions

It has been argued that mandatory sentencing has existed in many jurisdictions in Australia without attracting significant negative comment from human rights defenders in Australia and internationally.³² These laws are of two types: mandatory penalties, which include statutory fines for transport violations and minimum fines, and mandatory imprisonment laws for violent offences, sexual offences and murder. An example of the latter are provisions in the *Sentencing Act 1995* (NT), introduced in 1999, for mandatory imprisonment of adults for certain violent and sexual offences.³³

There are significant differences between the laws described above and mandatory minimum terms of imprisonment. In the case of mandatory penalties

28 *The Police v DCJ* (unreported Children's Court of WA), 10 February 1997. The WA Department of Justice (WA), *ibid*, Section 5, also revealed that CROs have been used generally 'where the court has determined special circumstances have existed – e.g. the offender was very young'.

29 Department of Justice (WA), *op.cit*, p24.

30 ATSIIC Submission to the Senate Legal and Constitutional References Committee, March 2000, *op.cit*, Submission 66, p28.

31 Second Reading speech to the *Criminal Law Amendment Bill 1997*, cited in Department of Justice (WA), *op.cit*, p8.

32 See debate on the *Juvenile Justice Amendment Bill (No.2)* and *Sentencing Amendment Bill (No.3)* between Syd Stirling, Dr Peter Toyne and Dennis Burke in First Session, Ninth Assembly, NT Parliament, 16 October 2001.

33 *Sentencing Act 1995* (NT), Schedules 2 and 3.



for traffic offences, for example, the mandatory provisions do not require a deprivation of liberty.

Those laws which require mandatory imprisonment with no minimum period for violent or sexual offences do not *per se* breach human rights obligations. Human rights concerns about mandatory minimum terms of imprisonment are not based solely on the 'mandatory' requirement, but on whether this results in unjust, disproportionate or arbitrary sentences. Other mandatory regimes, which are not the focus of this report, would need to be assessed on the same basis.

Recent developments in mandatory minimum imprisonment laws

Recent developments in the Northern Territory

There has been significant change in relation to mandatory sentencing laws in the NT over the past 18 months.

Pressure had been mounting on the federal government to override the NT legislation following the death of an Aboriginal boy in Don Dale Juvenile Detention Centre in Darwin in February 2000. In March 2000, the Senate Legal and Constitutional References Committee recommended that the federal Parliament override the laws as they related to juveniles by the passing of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*. The United Nations Committee on the Elimination of Racial Discrimination also expressed concern about the laws.

As a result, an agreement was reached between the Commonwealth and the NT Government on 10 April 2000 relating to mandatory sentencing for juveniles in the Northern Territory.³⁴ The agreement required the NT Government to amend legislation to ensure 17 year olds were treated as juveniles and not as adults by the criminal law³⁵ and for the Commonwealth to commit \$20 million over four years towards the establishment of a pre-court diversion scheme for juveniles and an Aboriginal interpreting service. The agreement preserved mandatory minimum sentencing laws.

On 18 August 2001 a new Government was elected in the NT. On 18 October 2001 it passed legislation to repeal mandatory sentencing provisions for juvenile and adult property offenders.³⁶ The repeals came into effect from 22 October 2001. The Government's rationale was that mandatory sentencing had:

resulted in the imposition of unjust and inappropriate sentences of imprisonment while having no positive impact on the crime rate. There is no evidence to suggest that under mandatory sentencing offenders have been deterred from committing property offences. Moreover, the mandatory sentencing regime for property offences provides no scope for discretion except insofar as it commits the imposition of greater

³⁴ Howard, J & Burke, D, Media Release, 10 April 2000.

³⁵ *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* (NT), s4 implemented this commitment. Any 17 year old charged as an adult but not sentenced at the date of commencement is entitled to be dealt with as a juvenile: s7. These provisions commenced on 1 July 2000.

³⁶ *Juvenile Justice Amendment Act (No. 2) 2001* (NT); *Sentencing Amendment Act (No. 3) 2001* (NT).



sentences. This has resulted in a regime that operates unfairly and inconsistently.³⁷

The legislative changes wholly repealed mandatory sentencing for juveniles. For adults, it repealed mandatory minimum sentences for several of the more minor offences and created a presumption of imprisonment for a series of offences known as 'aggravated property offences'.³⁸ This presumption of imprisonment differs from the previous mandatory sentencing provisions as it does not specify minimum sentences. Instead it only applies to aggravated circumstances (thus removing some of the more minor property offences caught by the previous legislation) and provides the court with discretion to impose a community work order or home detention order or not to impose imprisonment if exceptional circumstances exist. The definition of exceptional circumstances is left to judicial interpretation.

Recent developments in Western Australia

The WA mandatory minimum sentencing laws were examined by the Senate Legal and Constitutional References Committee in its March 2000 report on the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*. The Committee commented that the WA laws *in practice* are not as obviously in contravention of Australia's obligations as the NT laws.³⁹

While the Committee did not consider that the WA provisions were as bad as those in the NT, they did state that 'we are comparing bad with bad and we are trying to prioritise badness'.⁴⁰ Accordingly, the WA laws should also be overturned by passing the Bill. The WA Government defended the laws and restated its position that it would not repeal the laws.

On 10 February 2001, a new Government was elected in WA. It was required under the *Criminal Code* to review the operation of the mandatory sentencing provisions after they had been in operation for four years. This review was conducted by the Department of Justice during 2001, with the report of the review tabled in the WA Parliament on 15 November 2001.

The review sought to evaluate both the effectiveness of the provisions and operational issues concerning their implementation. Overall, the review concluded that rates of imprisonment for burglary for adults have varied little since the laws were introduced, supporting the view that the mandatory detention provisions 'have had little effect on sentencing patterns of adult burglary offenders'.⁴¹ Likewise, overall there was 'no reduction in the number of offences committed after the introduction of the amendments'.⁴²

37 Toyne, the Hon Dr P, Attorney-General, *Hansard*, Legislative Assembly (NT), Ninth Assembly, First Session, 16 October 2001.

38 An aggravated property offence is defined as an offence under the following sections of the Criminal Code: s211, s212, s213, s215, s218 (where subsection 2 applies), s226B (where subsection 3 applies), s251 (where subsection 2 applies) and an attempt to commit an offence under s213. In addition s226B creates a new aggravated property offence of home invasion.

39 Senate Legal and Constitutional References Committee, March 2000, *op.cit.*, p116.

40 *ibid.*, p116, quoted from Law Council of Australia evidence to the Inquiry.

41 *ibid.*, p28.

42 *ibid.*, p29.



In addition to this lack of effectiveness, the review identified a number of significant concerns with the operation of the scheme. It found that, in relation to adults, a:

lack of clarity on what constituted a strike, in combination with limited available information on police records for certain offences which made it difficult to determine whether a burglary was in a place of habitation, led to some problems in determining the status of a conviction.⁴³

The review found that these problems 'still exist to some extent'.⁴⁴ This lack of clarity could result in some delays in court, through adjournments while police records are reviewed in order to establish whether a defendant is a 'third striker'.⁴⁵ Similar difficulties were found to exist for juvenile defendants. While Department of Juvenile Justice records are more detailed than those of the police, they are also significantly more complicated.

As a consequence, the review concluded that 'the process required to establish the repeat offender status of a home burglar is cumbersome, manual and time consuming'⁴⁶ and 'has impacted, to some degree, on the workload of prosecutors and defence counsel and on the workload of the President of the Children's Court'.⁴⁷

The review found that the 'three strikes' provisions have had little impact on the adult courts, with only eight instances of mandatory imprisonment. This was due to the fact that 'under most circumstances someone facing their third conviction for home burglary would be sentenced to imprisonment anyway and 12 months would be below or at the bottom of the range of sentences being considered'.⁴⁸

Despite this, the review conceded the possibility of 'unfairly harsh and counterproductive outcomes'⁴⁹ for adult offenders under the provisions. For example, there is no time limit on the accumulation of strikes for adult offenders. One case was cited in which an offender had reached a second strike stage and then not offended for several years. In search of food she then offended again and qualified as a repeat offender. The Court considered that the minimum sentence of 12 months imprisonment required was harsh in the circumstances.⁵⁰ While this situation can on occasion be averted through the negotiation of different charges with the prosecutor, the review acknowledged that this is an unsatisfactory outcome as it transfers discretion from the judiciary to the more individualised and less transparent prosecutorial level.

Concerns were also expressed about how the scheme determines what constitutes a strike (in terms of both the sequence of offences as well as the number of offences that can lead to the recording of a strike). Examples were cited of offenders committing numerous home burglary offences with the

43 Department of Justice (WA), *op.cit*, p15.

44 *ibid*.

45 *ibid*.

46 *ibid*.

47 *ibid*, p17.

48 *ibid*, p21.

49 *ibid*.

50 *ibid*, p22.



knowledge that they would all contribute to a single strike and not classify them as a repeat offender.⁵¹ By implication, the system of strikes has resulted in some offenders being treated more leniently than they might otherwise be. On the other hand, an example was provided of an offender who pleaded not guilty to an offence at the same time as pleading guilty to two other offences. He became a repeat offender and was sentenced to a 12 month term of imprisonment. He was subsequently found guilty of the third offence and sentenced to a further 12 months. If he had been dealt with at the same time as the previous offences, he would only have received one 12 month term.⁵²

The review also identified an impact on the operation of the Drug Court, which is precluded from hearing cases concerning repeat offenders. This prevents the Drug Court from providing early intervention for some drug users.

WA case study⁵³

Q was a 14 year old boy from a regional area who was sentenced in relation to one aggravated burglary, one charge of possession of cannabis and breaching a CRO. The burglary offence occurred when the complainant and his wife were at home although they were not disturbed. The co-offender entered the house and stole \$15. Q was a lookout and did not enter the house at all. Q spent 21 days in custody and 37 days subject to a strict supervised bail regime. Q had a very serious cannabis problem and was prepared to address it by attending counselling sessions. He would smoke up to six cones of cannabis a day. His offending was clearly related to his need to obtain money for drugs. Also he was due to be taken by an older cousin to a remote community to be taken through the law. The Sentencing Judge indicated that if there was a choice, a sentence of detention of less than 12 months would have been imposed, however, as a result of the three strikes legislation a 12 month sentence of detention had to be imposed. It seems that this would have been a perfect case for the Drug Court regime which has been operating in the Children's Court since the end of 2000. As a result of mandatory sentencing such an option could not be considered.

In relation to juveniles, the review found that:

- the provisions have been used rarely in the Children's Court. There have been 143 juvenile convictions of 119 individuals under the law since it was introduced in 1996.
- the law has impacted significantly on Aboriginal juveniles primarily from non-metropolitan areas. 81 per cent of the 119 juvenile offenders were Aboriginal and 61 per cent of juvenile offenders lived outside metropolitan areas.
- on 22 occasions CROs have been imposed on juveniles instead of detention.⁵⁴

51 *ibid.*

52 *ibid*, p23.

53 Morgan, N, Blagg, H & Williams, V, *Mandatory Sentencing in Western Australia*, Report prepared for the Aboriginal Justice Council (WA) (forthcoming), p78.

54 *ibid*, pp23-24.



The significance of the mandatory detention requirements for juveniles is the admission by the review that 'while it is likely that for the most part juveniles sentenced to detention under section 401 would have gone into detention anyway, a few would not and for others shorter terms may have been considered more appropriate'.⁵⁵

The review also found in relation to juveniles that the mandatory detention provisions have a degree of arbitrariness and unfairness due to the calculation of strikes and the exercise of discretion to divert some juveniles but not others (concern about the lack of access to diversion for young Aboriginal offenders in WA is discussed in detail in the next chapter).⁵⁶

Despite these very significant concerns with the operation of the law, the Attorney-General's response to the review was that it demonstrated that 'the overwhelming majority of those convicted under the laws have an appalling history of offending'. In support of this he stated that 'juveniles caught by the laws had, on average, 50 prior convictions'. As a consequence, he concluded that 'he was satisfied the laws were targeting a very real problem with serious property offences'.⁵⁷

A less sensational description of the juvenile offender profile is provided by a research project by the WA Aboriginal Justice Council, which examined the circumstances of the 110 third strike cases (involving 73 Indigenous juveniles) which could be identified in the records of the Aboriginal Legal Service of WA. This review found that 73 Indigenous juveniles accounted for the 110 third strike sentences that could be identified. Of these, 54 individuals were dealt with just once and 19 individuals more than once (with only four individuals dealt with under the three strikes law four times or more).⁵⁸

It is disingenuous to suggest that the WA laws target the most serious repeat offenders and accordingly must remain. They do not. Serious repeat offenders are sentenced to terms of imprisonment of greater length than the mandatory minimum. The laws are irrelevant for such offenders.

The Attorney-General sought to distinguish the laws from the recently repealed NT laws on the basis that 'the WA laws only related to the very serious offence of home burglary'. As a consequence, the Attorney stated that the Government has no intention of repealing the legislation, despite his concern at the impact of the laws on Indigenous people, particularly those in regional areas.⁵⁹

Concerns about mandatory minimum terms of imprisonment

We assert with absolute confidence that mandatory penalties are inevitably capricious, arbitrary, unfair and unjust.⁶⁰

From the time they were proposed in the NT and WA, mandatory minimum terms of imprisonment or detention have been the subject of criticism from a

55 *ibid*, p25. Emphasis added.

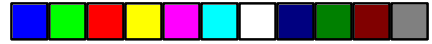
56 *ibid*, p26.

57 McGinty, The Hon J, *op.cit*.

58 Morgan, N, Blagg, H, & Williams, V, *op.cit*, p65.

59 McGinty, The Hon J, *op.cit*. See also 'Mandatory terms to stay', *The West Australian*, 16 November 2001, p3.

60 Johnson, D, & Zdenkowski, G, *op.cit*, p18.



variety of perspectives, including breaches of human rights, ineffectiveness, cost and the disproportionate impact on Indigenous people.⁶¹

Breaches of human rights obligations

The Human Rights and Equal Opportunity Commission has raised significant concerns about the human rights implications of mandatory minimum terms of imprisonment on a number of occasions since these provisions were introduced.⁶² Similarly, three of the six United Nations human rights treaty committees also expressed concern about the human rights implications of mandatory detention laws during 2000.

The following concerns relate to the imposition of mandatory minimum terms of detention for juveniles. They apply equally to the NT and WA laws.

▫ ***Best interests of the child as a primary consideration (article 3.1, Convention on the Rights of the Child (CROC))***

The best interests of the child should be a primary consideration in all actions concerning children, including actions by courts of law, administrative authorities and legislative bodies. Mandatory detention laws were explicitly intended to achieve deterrence and retribution rather than rehabilitation, and there is no evidence that the best interests of children have ever been a concern, let alone a primary consideration, in their development and enforcement in either WA or the NT.

▫ ***Children require special measures of protection (article 24, International Covenant on Civil and Political Rights (ICCPR))***

Every child has the right to receive from his/her family, society and State the protection required by his or her status as a child. This also entails the adoption of special measures to protect children. Under the WA system no concessions were given to child offenders over adult offenders. Although the Children's Court found a 'loophole' in the legislation in the case of children, this was not the intention of the laws and provides only a limited capacity to provide for children's special needs. Further, in WA, children must serve a longer proportion of their sentence than adults before being eligible for parole.

▫ ***Detention of children as a measure of last resort (article 37(b), CROC)***

The arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time. Clearly, laws which impose a mandatory minimum term of detention do not so allow. Although in the NT second time juvenile offenders could be diverted to an

61 For a useful summary see Johnson, D, & Zdenkowski, G, *ibid*, Ch 2, pp4-6.

62 See, for example, HREOC, *Bringing them home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, HREOC Sydney 1997, pp528-530; Aboriginal and Torres Strait Islander Commissioner *Social Justice Report 1999* HREOC Sydney 1999 ch 5; HREOC Submission to the Senate Legal and Constitutional Legislation Committee *Inquiry into the Human Rights (Sentencing of Juvenile Offenders) Bill 1999*; Aboriginal and Torres Strait Islander Commissioner *Social Justice Report 2000*, HREOC, Sydney, 2000, pp67-85.



approved program, this diversion was limited to a small number of program options and could only be imposed once. The introduction of the police diversion scheme was a welcome improvement, but the courts were still prevented from considering alternatives to detention in cases before them. In WA, the use of CROs by the courts is an extremely limited alternative to a mandatory minimum term of detention.

n A variety of dispositions must be available for child offenders (article 40.4, CROC)

There must be a variety of dispositions available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence. Mandatory minimum terms of imprisonment preclude consideration of a range of appropriate dispositions. The laws do not allow the circumstances of the offence or the offender to be taken into account in sentencing so as to ensure an appropriate sentence for the individual case.

n Rehabilitation and reintegration of a child offender should be the essential aim. A child offender should be treated in a manner which takes into account his or her age (article 40.1, CROC)

Rehabilitation should be an aim of all actions taken in the case of juvenile offenders. However, the objectives of both the NT and WA laws have not been rehabilitative as much as deterrent and retributive. For children from remote Indigenous communities, detention has not assisted them in reintegrating into their community effectively. Other alternatives tailored to the child's rehabilitative needs cannot be imposed. The use of CROs in WA has not ensured that this rehabilitative and reintegrative purpose is consistently applied (as the examples of instances refusing CROs above indicate).

Mandatory detention laws in the NT have not allowed courts to take into account whether the child is 11 or 17 years old – the mandatory minimum term has applied regardless. In WA the judiciary has been able to take into account a juvenile offender's age when considering their sentence but is limited to ordering a CRO.

The following concerns relate to the imposition of mandatory minimum terms of detention for juveniles *and* adults. They apply equally to the NT and WA laws.

n Sentence must be reviewable by a higher tribunal (article 40.2(b), CROC; article 14.5, ICCPR)

The conviction and the sentence must be capable of review by a higher tribunal. The NT and WA laws remove sentencing discretion and prevent an appeal court from reconsidering the penalty prescribed as a compulsory minimum.

The United Nations Special Rapporteur on the Independence of the Judiciary has also expressed concern that mandatory minimum imprisonment laws restrict the right of appeal:

This right of appeal, which is again part of the requirement of a fair trial under international standards, becomes nugatory when the trial court imposes a prescribed minimum sentence. There is nothing in the sentence then for the Appellate Court to review. Hence, legislation prescribing



mandatory minimum sentences may be perceived as restricting the requirements of a fair trial process and may not be supported under international standards.⁶³

n Detention must not be arbitrary (article 37(b), CROC; article 9.1, ICCPR)

No one should be subjected to arbitrary arrest or detention. According to the UN Human Rights Committee, sentencing may still be arbitrary notwithstanding that it is authorised by law.⁶⁴ Arbitrary has been interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability. Further, custody could be considered arbitrary if it is not necessary in all the circumstances of the case, which indicates that detention must be a proportionate means to achieve a legitimate aim. Mandatory sentencing clearly breaches article 9(1) when it is imposed for trivial as well as more serious offences.⁶⁵ Mandatory minimum sentences for property crimes inevitably impact at the lower end of the scale (as courts are more likely to impose sentences above the mandatory minimum in the case of more serious offences). The punishment of imprisonment in many cases simply does not fit the crime.⁶⁶ Inconsistencies in determining what constitutes a strike under the WA legislation, with the consequent imposition of 12 months detention or imprisonment for some but not others, also constitute arbitrariness (see further case studies below).

On 28 July 2000, the United Nations Human Rights Committee expressed concern that:

Legislation regarding mandatory imprisonment in Western Australia and the Northern Territory, which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and would seem to be inconsistent with the strategies adopted by the State party to reduce the over-representation of indigenous persons in the criminal justice system, raises serious issues of compliance with various articles of the Covenant...⁶⁷

n Laws and policies must be non-discriminatory and ensure equality before the law (article 2, article 26, ICCPR; article 2.1(a), (c) and 5(a) International Convention on the Elimination of All Forms of Racial Discrimination (CERD))

The ICCPR prohibits direct and indirect discrimination in the enjoyment of rights contained in the ICCPR, which includes freedom from arbitrary arrest and the right to review of sentence. Race discrimination, both direct and indirect, is also prohibited under CERD. The Commission has argued that mandatory sentencing laws in the NT and WA are indirectly discriminatory on the basis of

63 Data' Param Kumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers, address to the UNSW Symposium, *Mandatory Sentencing Rights and Wrongs*, UNSW, 28 October 2000, p10.

64 UN Human Rights Committee, *A v Australia*, UN Doc: CCPR/C/59/D/560/1993, 30 April, 1997.

65 See Joseph, S, Schultz, J, Castan, M, *The International Covenant on Civil and Political Rights: cases, materials, and commentary*, Oxford University Press, Oxford, 2000.

66 See Johnson, D & Zdenkowski, G, *op.cit.*, pp97-104 for examples of cases in the NT.

67 Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc: HRC/A/55/40, 28 July 2000, Section 3.



the pattern of sentencing which has a disproportionate impact on Indigenous people. It has also argued that, in the NT at least, the selected offences are committed overwhelmingly by Indigenous people.⁶⁸

On 24 March 2000, the United Nations Committee on the Elimination of Racial Discrimination expressed its concern:

about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.⁶⁹

- n ***Physical and mental condition must be taken fully into account (Principle 5, Declaration on the Rights of Disabled Persons; Principle 6, Declaration on the Rights of Mentally Retarded Persons)***

If judicial proceedings are instituted against persons with a disability, the legal procedure applied should take their physical and mental condition fully into account. Some people with mental illnesses, personality disorders and intellectual disabilities have poor impulse control. When angry or frustrated they tend to lash out and damage property. This may lead to charges of criminal damage. Under the mandatory sentencing provisions in the NT such charges attracted an automatic term of imprisonment unless brought within the exceptional circumstances provision.

Mandatory sentencing laws diminish the courts' ability to take into account circumstances where a person's disability is relevant to the sentence they should receive. In one case in June 2000 a 24 year old intellectually disabled man was jailed for 90 days in the NT. The magistrate stated:

This Court's hands are tied, of course, by mandatory sentencing. It's clear that this defendant suffers from an intellectual disability, and I can quite confidently say that, but for mandatory sentencing, I think I would not have imposed a sentence which would have resulted in this man being imprisoned for so long. It may well be that I may have even suspended it fully.⁷⁰

Although under section 78A(6B) of the *Sentencing Act 1995* (NT) there was a provision for the court not to order imprisonment for first time adult offenders in exceptional circumstances, the conditions required to meet the exceptional

68 Arguments on why mandatory detention provisions are discriminatory were discussed in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit.*, Ch 3.

69 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, UN Doc: CERD/C/304/Add.101, 19 April 2000, para 16. See also: United Nations Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc: CRC/C/15/Add.79, 10 October 1997, para 22; United Nations Committee against Torture, *Concluding Observations on Australia*, UN Doc: A/56/44, 26 November 2000, paras 52, 53.

70 *Sydney Morning Herald*, 'New call to end mandatory laws', Tuesday 25 June 2000.



circumstances provision were narrow and did not take into account mental disability. In fact, because they required that the offending behaviour be an aberration of usual behaviour, they implicitly excluded persons whose behaviour might be influenced by a persistent disorder. There were other ways to avoid imposing a mandatory sentence of imprisonment in the NT, but these were limited and generally not of benefit for those with behavioural disorders or intellectual disabilities.⁷¹

As set out above, there are no exceptional circumstances provisions which would enable a court to take a disability into account under the WA provisions.

n *Ensuring consistency of international obligations across all levels of government (article 50, ICCPR; article 2, CERD)*

CERD requires that the federal government rescind, nullify, repeal or amend all laws (at any level of government) that are inconsistent with the Convention. The ICCPR contains a similar requirement. In March 2000 the Committee on the Elimination of Racial Discrimination expressed concern at the failure of the Commonwealth Government to ensure compliance of the States and Territories and recommended that:

the Commonwealth Government ... undertake appropriate measures to ensure the consistent application of the provisions of the Convention, in accordance with article 27 of the Vienna Convention on the Law of Treaties, at all levels of government, including states and territories, and if necessary by calling on its power to override territory laws and using its external affairs power with regard to state laws.⁷²

Having discussed the deal between the NT and Commonwealth Governments to preserve mandatory sentencing in April 2000, the United Nations Human Rights Committee commented:

While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligation to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50). The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone

71 S78(1) of the *Mental Health and Related Services Act 1998* (NT) enables a court to dismiss a charge against a person if it is of the opinion that the person is suffering from a mental illness or is mentally disturbed. This provision does not apply to people who are intellectually disabled or who have personality disorders, impulse disorders or acquired brain injuries. The *Sentencing Act 1995* (NT), ss78P-86 enables a court to order that a person found guilty of an offence be taken to a hospital for assessment and treatment if s/he appears to be mentally ill or disturbed. In 1999 the provisions were amended to ensure that property offenders are eligible for mental health orders. The procedure is not usually of any benefit to those with behavioural disabilities. Anecdotal evidence from legal services in the NT also suggests there has been a marked increase in the number of 'unfit to plead' applications before the Supreme Court since the introduction of mandatory sentencing.

72 Committee on the Elimination of Racial Discrimination, *op.cit*, para 7.



restrictions on Covenant rights that are not permitted under the Covenant.⁷³

Mandatory detention regimes in both the NT and WA also breach the principles and recommendations of significant reports such as the report of the Royal Commission into Aboriginal Deaths in Custody and the *Bringing them home* Inquiry.

The effectiveness of mandatory minimum imprisonment laws

The manner in which mandatory minimum imprisonment laws in both the NT and WA breach human rights obligations is so substantial that the laws cannot be seen as socially useful or acceptable. There are also a range of other reasons, grounded in the practical operation of the laws, which render them ineffective as well.

n **Mandatory minimum imprisonment laws do not meet their objectives**

In his Second Reading speech introducing the mandatory minimum term amendments, the NT Attorney-General identified the main benefits of the laws as deterrence, retribution, incapacitation and 'sending a strong message to the community that these offenders will not be treated lightly'.⁷⁴

In WA, the principal objectives of the three strikes provisions, as articulated by the Government at various stages, include deterrence, incapacitation, rehabilitation and indicating the seriousness of the offence to the community. The justification has shifted over the course of the laws' existence.⁷⁵ When introduced, for example, the WA Government explained the objectives of the laws as to 'deter burglars and incapacitate those who commit such offences'.⁷⁶ The Senate Committee inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* considered that the main objective of the WA laws was deterrence rather than incapacitation.⁷⁷ The Attorney-General of the newly elected Government recently claimed that the policy was 'effective in stopping those people offending while they are in prison'.⁷⁸

There is little evidence that these objectives have been met in any substantial way or that mandatory minimum imprisonment laws have resulted in significant crime prevention in either the NT or WA.

Deterrence

It is difficult to isolate the impact of mandatory minimum imprisonment laws from other developments in the NT and WA. For example, any evaluation of the WA laws would have to take into account the various reforms to the offence of burglary, including increased maximum penalties and the creation of a new

⁷³ Human Rights Committee, *op.cit.* Section 3.

⁷⁴ Burke, D, *Hansard*, Legislative Assembly (NT), 17 October 1996, p9686.

⁷⁵ Morgan, N, 'Mandatory Sentences in Australia', *op.cit.* p168.

⁷⁶ Foss, P, Attorney-General (WA), *Ministerial Statement*, 22 August 1996; also see Mr Prince, K, Minister for Health, Second Reading of *Criminal Code Amendment Bill (No.2)*, *Hansard*, Legislative Assembly (WA), 17 September 1996, p5212.

⁷⁷ Senate Legal and Constitutional References Committee, *op.cit.* p10.

⁷⁸ Quoted in *The West Australian*, 'Mandatory terms to stay', 16 November 2001, p3.



penalty for 'aggravated' burglary.⁷⁹ One measure of the deterrent effect of mandatory minimum imprisonment laws is to examine the levels of reports of property and burglary offences since the introduction of the laws.⁸⁰

In the NT, reporting trends show that there has been no real change in reporting of property crime in the NT between 1994 and 1998. Any small changes in the numbers of property offences in the NT seem to have occurred independently of the laws. Over the previous six years the numbers of unlawful entry, motor vehicle theft and other theft began to decline prior to the introduction of the law, but began to rise again in recent years.⁸¹ The number of all offences against property in the NT increased by 24 per cent between 1999/2000 and 2000/2001.⁸²

In WA, the number of residential burglaries reported to the police declined in 1996 after reaching a peak in 1995. However, the decline began prior to the introduction of the provisions. The annual burglary rate remained constant during 1997 and actually increased in 1998.⁸³ It remained fairly constant over 1998-2001. As noted, the WA Department of Justice Review of the WA laws found that victimisation rates for break and enter and reported home burglary offences between 1995 and 1999 are inconclusive. The review suggests that although the mandatory imprisonment laws may have had a part in arresting an increase in the rate of burglary, the same could be said for the impact of the *Pawnbrokers and Secondhand Dealers Act 1994*, which made it harder to sell household items. The review stated that there appears to be no reduction in the numbers of offences committed after the introduction of the laws.⁸⁴

For the laws to have any deterrent value, they also must be understood by the groups targeted. Otherwise, offenders will continue to commit offences without concern about the consequences. Research suggests that defendants in the NT viewed mandatory terms as a 'normal' court event and had limited understanding of the court process in general. In addition, more minor crimes such as criminal damage are often spontaneous, with offenders not considering the consequences, let alone the likely sentence.⁸⁵ Many property crimes in the NT and WA are also committed under the influence of alcohol, petrol or other drugs, which limits the ability for deterrence to play a role in preventing the offences.⁸⁶

79 Morgan, N, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories', *UNSW Law Journal Forum*, January 1999, p6. See also the Department of Justice Review (WA), *op.cit.*

80 Note the existence of other variables such as changes in the desire of victims to report, which may be based on anything from insurance to perceptions of police efficiency.

81 Aboriginal Justice Advocacy Committee NT, Submission to the Senate Legal and Constitutional References Committee Inquiry, *op.cit.*, Submission 35, p6.

82 NT Police, Fire and Emergency Services, *Annual Report 2000-2001*, p41.

83 Morgan, 'Mandatory Sentences in Australia': *op.cit.*, p183.

84 Department of Justice (WA), *op.cit.*, p31.

85 Johnson, D & Zdenkowski, G, *op.cit.*, p17.

86 An NT study shows that in 63 per cent of mandatory sentencing cases the offender was under such influences: Sheldon, J & Gowans, K, *Dollars Without Sense: A Review of the Northern Territory's Mandatory Sentencing Laws*, prepared for the North Australian Aboriginal Legal Aid Service, <http://ms.dcls.org.au>, p2. In WA, substance abuse was identified as a problem to the court in 55 out of the 110 cases involving Indigenous juveniles under the three strikes regime: Morgan, N, Blagg, H & Williams, V, *op.cit.*, p67.



Retribution

Retribution is achieved only if the punishment fits the crime. Removing judicial discretion to determine the length of sentences inevitably leads to harsh and unfair results. All defendants face the same minimum term regardless of the objective seriousness of the offence or their subjective mitigating factors. Mandatory minimum sentences for property offences breach the well established sentencing principle of proportionality.

Rehabilitation

Imprisonment generally has higher economic and social costs than community based supervision, rehabilitation programs or fines. Custodial environments place the emphasis on physical containment rather than on rehabilitation. There are serious concerns about the capacity of the prison system to rehabilitate Indigenous offenders. In some jurisdictions, rehabilitation is the primary sentencing principle in the children's court.⁸⁷

Incapacitation

Incapacitation literally means removing the offender from the community so that he or she is no longer in a position to engage in criminal activity. It is a short term solution for more minor offences, does little to rehabilitate the person and often has an unacceptably high cost to the offender and the community.

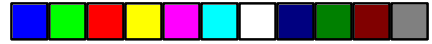
The goal of incapacitation is to identify and remove those offenders who are at risk of re-offending. Mandatory detention laws for repeat offenders seek to predict how individuals will behave in the future based on how they have behaved in the past. This is imprecise and can result in the selection and incapacitation of so-called 'false positives': that is, among those incapacitated will be some who will not offend again.⁸⁸ Courts are in a better position than parliament to make a prediction about an offender's future prospects based on the offender's background and circumstances established by evidence before the court.

In addition, policies based on incapacitation arguments fail to recognise the effects of imprisonment or detention. There are two gaols in the NT, one in Darwin and the other in Alice Springs. When one is full, prisoners are transferred to the other. All juveniles in detention are held at Don Dale Juvenile Detention Centre in Darwin. Similarly, all juvenile detention centres in WA are situated in Perth, far from where many young Indigenous people live and commit offences. A WA Aboriginal Legal Service study of 'three strikes' cases found that approximately 82 per cent of the juvenile cases it surveyed involved individuals from a regional (non-metropolitan) area, and that 55 per cent of these were from the Kimberley and Pilbara, between 1000 and 4000 km away from Perth.⁸⁹ Incarcerating Aboriginal people commonly means removing them from their country, often for the first time in their lives. They are unlikely to receive visitors at such distances, as many families cannot afford to visit. This can have a

87 *Children (Criminal Proceedings) Act 1987 (NSW)*, s6; *R v GDP*(1991) 53 ACrimR 112.

88 Roche, D, 'Mandatory Sentencing', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, December 1999, p3.

89 Morgan, N, Blagg, H & Williams, V, *op.cit*, p66.



devastating effect on the mental health of the detainee and serious ramifications for their families including emotional trauma and loss of income support. This level of upheaval is not warranted by many of the offences included in the mandatory minimum term provisions.

Reparation

There is a longstanding principle that a criminal sanction should symbolise the offender making reparation to the community. It is not clear how incarceration, with its attendant financial and social costs, heals the harm caused by a crime. Certainly, other sentences such as community work contribute more directly to the community. Other options, such as victim/offender conferences, allow the offender to make direct reparation to the victim. These are examined in more detail in Chapter 5.

Indicating the seriousness of the offence in response to community concern

In its evidence to the Senate Inquiry into the 1999 Bill, the WA Government stated that the legislation was introduced to 'indicate the very serious nature of the offence' in response to community concern about the high rates of home burglary in WA.⁹⁰ On a superficial level this is an easily achieved and self-fulfilling objective. It is notable that there has been no real test of whether the laws have addressed community concerns.

In a media release following the review of the WA laws, WA Attorney-General Jim McGinty, claimed that the laws target only the most serious repeat offenders.⁹¹ However, according to one study, only 40 per cent of the cases involved the complainant or someone else being present when the offence took place. Only 5.4 per cent involved violence or threats of violence.⁹² This does not discount the seriousness of the offence of home burglary, but does indicate that there are a variety of circumstances of offending.

The serious nature of these offences may be 'indicated' in a variety of other ways than mandatory minimum sentences, including maximum penalties, guideline judgments⁹³ and community education. Further, and more importantly, there are many more ways that the offences can be prevented.

90 Morgan, 'Mandatory Sentences in Australia', *op.cit.*, p169.

91 McGinty, The Hon J, *op.cit.*

92 Morgan, N, Blagg, H & Williams, V, *op.cit.*, p63.

93 Guideline judgments have been the practice of the English Court of Appeal for some years although there is no statutory basis to this. In Australia, the Chief Justice of NSW issued a guideline judgment in 1998 for the offence of driving in a manner causing death or grievous bodily harm: *R v Jurisic* [1998] NSWSC 597. This decision formalised a longstanding practice of the Court of Criminal Appeal of indicating what offences should usually attract a custodial sentence and what offences should usually attract a substantial term of imprisonment. The Supreme Court and Court of Criminal Appeal in WA also have a statutory power to give guideline judgments to be taken into account by courts when 'sentencing certain offenders'. The authority of guideline judgments has recently been thrown into question by the High Court: *Wong v The Queen*; *Leung v The Queen* [2001] HCA 64 (15 November 2001).



If the community were better informed about the practical operation of these laws, their ineffectiveness and the possible injustices which could occur, even victims may well choose other options for dealing with repeat property offenders.⁹⁴

n *Cost effectiveness*

Much of the political rhetoric used in debates about mandatory minimum terms of imprisonment focuses on the financial costs of property crime to the community. However, the costs of incarceration are themselves high.

In the NT, the daily average cost per adult prisoner in 1999/2000 was \$144.34.⁹⁵ Using these averages, it cost \$2020.76 for 14 days, \$12,990.60 for 90 days and \$52,684.10 for 365 days of imprisonment.⁹⁶ For juvenile offenders, the average daily cost of detention was as high as \$540.43.⁹⁷ This would equal \$15,132.04 for 28 days detention.

In WA, it cost \$180.85 to keep an adult offender in prison per day.⁹⁸ It cost \$437.64 to detain a juvenile offender per day.⁹⁹

NAALAS has estimated that NT Correctional Services spent an additional \$4,981,266 on the imprisonment of property offenders as a result of mandatory sentencing.¹⁰⁰

Overseas studies of mandatory sentencing laws show similar results. Cost benefit analysis done by RAND Corporation in the USA estimates that every million dollars spent on implementing California's three strikes laws would prevent 60 serious crimes, whereas providing parent training and assistance for families with young children at risk would prevent 160 serious crimes.¹⁰¹ After a two-decade boom in prison construction and increase in prison numbers, cost and ineffectiveness are causing some US states to roll back their mandatory sentencing laws. Louisiana, Connecticut, Indiana and North Dakota have dropped their mandatory sentencing laws and returned discretion to the judges.¹⁰²

94 See Sheldon, J & Gowans, K, *op.cit*, p6 for a description of a 1998 Neighbourhood Watch workshop which posed sentencing dilemmas to community members with interesting results.

95 NT Correctional Services, *Annual Report 1999-2000*, NT Corrections, Darwin, p28. Average daily costs are calculated by dividing the total cost by the daily average population.

96 However, NT Correctional Services emphasises that average daily costs include the cost per prisoner of maintaining the whole establishment and that the cost of keeping one extra prisoner is usually less, provided the extra prisoners are held within the overall design capacity and staffing parameters of the Centres: NT Correctional Services, *Annual Report 2000-2001*, NT Corrections, Darwin, p38.

97 NT Correctional Services, *Annual Report 1999-2000*, *op.cit*, p31. In 1998/99 the cost per juvenile detainee per day was \$343.73. The substantial increase can partly be attributed to a decrease in detainee numbers as many costs are fixed regardless of prisoner population.

98 WA Ministry of Justice, *Annual Report 1999/2000*, p75.

99 *ibid*, p78.

100 Sheldon, J & Gowans, K, *op.cit*, p7.

101 Roche, D, *op.cit.*, p4. A new study of the Californian 'three strikes' laws also shows that after seven years the law has had no significant effect on California's crime rates. See '3-Strikes Law Is Overrated in California, Study Finds', *New York Times*, 23 August 2001.

102 'Budget squeeze opens prison doors', *Sydney Morning Herald*, 4 September 2001.



n *Effect on sentencing principles and operation of the criminal legal process*

Aside from violating human rights principles, mandatory minimum terms of imprisonment or detention undermine sentencing principles which are well-established in Australia and abroad.¹⁰³

Included in the general principles of juvenile justice laid out in the *Young Offenders Act 1994* (WA) are principles requiring consideration of a young person's age, maturity and cultural background.¹⁰⁴ The Act also states that detention should only be imposed on a young person as a last resort and, if required, for as short a time as is necessary.¹⁰⁵

It is notable that the *Juvenile Justice Act 1983* (NT), in contrast to other jurisdictions, does not include an objects clause, general juvenile justice principles or sentencing principles.¹⁰⁶

Many of the judicial officers responsible for imposing mandatory minimum terms of custody have criticised the NT provisions. For example, in *Trenerry v Bradley*, each of the three judges delivering the decision made adverse comment.¹⁰⁷ Justice Mildren commented:

Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.¹⁰⁸

Mandatory minimum terms of custody have also been controversial in a number of international jurisdictions. For example, the High Court of Fiji recently held that a mandatory minimum of three months imprisonment for possession of less than 10 grams of cannabis was unconstitutional because it was grossly disproportionate to the offence.¹⁰⁹ Justice Shameem stated:

103 Johnson, D & Zdenkowski, G, *op.cit.*, p15.

104 *Young Offenders Act 1994* (WA), s7(l).

105 *Young Offenders Act 1994* (WA), s7(h).

106 See, for example, *Children (Criminal Proceedings) Act 1987* (NSW) s6, *Young Offenders Act 1993* (SA) s3, *Youth Justice Act 1997* (Tas) ss5, 6 and *Children, Young Persons and Their Families Act 1989* (NZ) ss4(f), 208.

107 (1997) 115 NTR 1 reproduced at www.austlii.edu.au (15 September 2000) Martin CJ, at p3; Angel J, at p9; Mildren J, at p11.

108 (1997) 115 NTR 1 reproduced at www.austlii.edu.au (15 September 2000) Mildren J, at p11.

109 Justice Shameem found that the mandatory sentence was invalid for violation of s25(1) of the 1997 Fijian Constitution that states 'Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment': *State v Audie Pickering* (unreported), 30 July 2001, p25. The judgment provides a useful summary of international case law on mandatory minimum terms of imprisonment. It should be noted, however, that the reasoning in the case flows from the existence of a Bill of Rights in the Fijian Constitution, the fact that the mandatory penalty was introduced by way of presidential decree rather than legislation and the particular circumstances of the defendant.



[M]andatory minimum terms do not allow the judiciary to apply proper sentencing principles, and do not permit for adjustment according to the personal circumstances of the case.¹¹⁰

Mandatory minimum sentences also undermine the criminal justice process by shifting discretion from the judiciary to police and prosecutors, at least in regard to the offences attracting compulsory custody.¹¹¹ Once a matter reaches the sentencing stage the result is inevitable, but at the stage of charging and prosecuting there is scope for an offence that does not attract a mandatory minimum to be substituted, provided it is appropriate to the alleged facts. For example, a charge of offensive behaviour may be preferred to one of criminal damage. The decisions made by police and prosecutors are less open to public scrutiny and safeguards than judicial decision-making. There is hence more danger that these decisions could be made in a capricious or arbitrary manner.

Mandatory sentencing laws also distort the actions of defence lawyers, who may 'horse trade' for charges without the penalty attached, or seek to get multiple charges heard in a block. There is also evidence in WA that matters that may constitute a strike are concealed from the court in order to avoid the mandatory minimum sentence.¹¹²

Incorrect applications of the laws have also led to unjust outcomes. The most tragic example of this in the NT was the case of a 15 year old boy from Groote Eylandt who died on 10 February 2000 while serving a mandatory minimum term of detention. The boy died in Royal Darwin Hospital after committing suicide in his cell at Don Dale Juvenile Detention Centre the night before.¹¹³ A significant aspect of the evidence at the inquest was that the boy was mistakenly classified as a third striker when sentenced. He need not have been in custody at all.

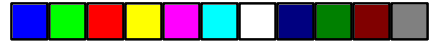
In WA there have been difficulties in identifying repeat offenders for the purposes of the law. In one case police alleged that a 16 year old boy from a remote community was a repeat offender and he was therefore remanded in custody to Perth for sentence. He faced only one charge of home burglary, which occurred in his community. He entered the house with some friends when the owner was absent, cooked some food and watched TV. He spent 44 days in custody in Perth away from his family. When it was established that he was not a repeat offender, the Children's Court President sentenced him to a Youth Community

110 *State v Audie Pickering* (unreported) 30 July 2001, Shameem J, at p9. For further discussion of mandatory minimum terms and sentencing principles in other international jurisdictions see: South African Law Commission, Issues Paper 12, *Sentencing: Mandatory Minimum Sentences* wwwserver.law.wits.ac.za/salc 14 August 2001. See also Johnson, D & Zdenkowski, G, *op.cit*, pp129-137; New South Wales Law Reform Commission, Discussion Paper 33, *op.cit*, Chapter 3.

111 See Sheldon, J & Gowans, K, *op.cit*, p12.

112 Morgan, N, Blagg, H & Williams, V, *op.cit*, p38.

113 An inquest into the boy's death began on 11 September 2000 and was adjourned until 22 January 2001. See: Banks, R, 'Benjamin: behind a death in detention', *Rights Now*, National Children and Youth Law Centre, Sydney, September 2001, pp7-8. The Coroner released findings and recommendations on 19 December 2001.



Based Order for three months. He had already served the equivalent of a three month sentence of detention.¹¹⁴

Mandatory minimum terms of imprisonment and their impact on Indigenous people

Mandatory minimum sentencing laws in both the NT and WA impact disproportionately on Indigenous people. While data on mandatory provisions in both the NT and WA are poor,¹¹⁵ the differential impact of the laws can be shown.

In WA, Aboriginal juveniles account for 81 per cent of all identified 'three strikes' juvenile cases since the introduction of the law. This is despite Aboriginal juveniles constituting approximately one third of all offenders who come before the Children's Court (ie, they are disproportionately represented in third strike offences).¹¹⁶ Moreover, 61 per cent of third strike juvenile cases were from non-metropolitan areas. In 93 per cent of these cases, the offender was Indigenous.¹¹⁷

In the NT in 2000/2001, approximately 79 per cent of prisoners sentenced for all property offences were Indigenous.¹¹⁸ Indigenous people comprise 63 per cent of adult prisoners and 75 per cent of juvenile detainees in the NT.¹¹⁹ Only 28.5 per cent of the NT population are Indigenous.¹²⁰

Although property offences are committed overwhelmingly by men,¹²¹ it was argued to the Senate Inquiry in 2000 that the number of women sentenced under property laws in the NT has increased at a greater rate than men.¹²² The NT Government submitted to the Inquiry that only 2 women were sentenced solely on the basis of mandatory sentencing in 1996/97 which rose to 22 in

114 Case 'A' in Morgan, N, Blagg, H & Williams, V, *op.cit*, p69. Part of the problem in WA is that the process of identifying a third strike is by manual inspection of Police Records and Children's Court sentence records. This is complicated by the fact that home burglary was not recorded as a separate offence prior to the introduction of the legislation. Further, cases of 'aggravated burglary' which occurred and were recorded after the legislation do not identify which are aggravated home burglaries. Juvenile and adult record systems are not able to flag a conviction as a strike. The complications are multiplied when the charges are lodged in a country court. Department of Justice (WA), *op.cit*, pp16-17.

115 This issue was raised in the report of the Senate Legal and Constitutional References Committee Inquiry, *op.cit*, p21.

116 Department of Justice (WA), *op.cit*, p24.

117 Department of Justice (WA), *op.cit*, p25. These figures are similar to those presented in Morgan, N, Blagg, H & Williams, V, *op.cit*, p3.

118 NT Correctional Services, *Annual Report 2000-2001*, *op.cit*, Table 16, p86.

119 *ibid*, p47. Note that there has been a significant increase in the numbers of foreign nationals, mostly 'people smugglers', in custody since 1999. If these are discounted, Indigenous adults have comprised 80 per cent of adults in custody in 1999, 2000 and 2001: *ibid*, p26.

120 Australian Bureau of Statistics, Special Article – Aboriginal and Torres Strait Islander Australians: A statistical profile from the 1996 Census (*Year Book Australia*, 1999), p2.

121 98 per cent of juvenile offenders sentenced under the three strikes provisions were male: Department of Justice (WA), *op.cit*. In the NT, 96 per cent of the sample of mandatory sentencing cases were men: Sheldon, J & Gowans, K, *op.cit*, p2.

122 Senate Legal and Constitutional References Committee, *op.cit*, p32.



1998/99.¹²³ Although the numbers are still not large, this indicates a substantial increase in women sentenced to detention.¹²⁴

In WA, 15 per cent of Indigenous people arrested for burglary were women, excluding those of unknown ethnicity. Indigenous women make up a greater proportion of the total number of women arrested for the offence (approximately 44 per cent) compared to the proportion of Indigenous men of all men arrested (37 per cent).¹²⁵

The Commonwealth Government has argued at various stages that the mandatory sentencing laws are not discriminatory because they apply equally to Indigenous and non-Indigenous offenders.¹²⁶ The prohibition of discrimination, however, is more extensive than prohibiting a direct differentiation of treatment. Article 1.1 of CERD, for example, includes racial discrimination 'in purpose or effect' and clearly includes indirect discrimination.¹²⁷ The definition of discrimination requires that governments take differential impacts on particular racial groups into account.

There are a number of factors that can lead to a disproportionate impact of mandatory detention laws on Indigenous people, including the following:

i) Selection of offences subject to mandatory detention

The selection of offences that were subject to mandatory detention in the NT specifically targeted offences overwhelmingly committed by Indigenous people, especially young people, while specifically excluding offences generally committed by non-Indigenous people.

In 1996 three quarters of matters (75.6 per cent) involving Indigenous juveniles in the NT were property offences, compared to 61.4 per cent for non-Indigenous juveniles. Nearly half (49.2 per cent) of all Indigenous juvenile appearances were for breaking and entering. As much as 77 per cent of juvenile offences for breaking and entering and 73 per cent of stealing of motor vehicles involved young Indigenous offenders.¹²⁸

On the other hand, other property offences were not targeted by the laws. In the NT in 1996, roughly 77 per cent of adult fraud offences and 100 per cent of juvenile fraud offences involved non-Indigenous defendants. Fraud is not

123 *ibid*, p32.

124 Sheldon, J & Gowans, K, *op.cit*, p10, claimed that there was an increase of 485 per cent of women imprisoned in the NT between 1996/97 and 1998/99 and this increase can be attributed almost solely to mandatory sentencing laws. However, others have argued that this increase is due to the large numbers of women in custody for fine defaults: Senate Legal and Constitutional References Committee Inquiry 2000, *op.cit*, p81.

125 Ferrante, A, Fernandez, J and Loh, N, *Crime and Justice Statistics for WA: 2000*, WA Crime Research Centre, UWA, Perth, November 2001, Table 2.1, p55. Note that 49 males and 8 females are not included in these calculations as ethnicity is unknown.

126 See explanation of the Commonwealth Government's dialogue with CERD and the Human Rights Committee in the *Social Justice Report 2000*, *op.cit*, pp67-72.

127 See also General Comment 18, United Nations Human Rights Committee, 1989, para 7, for a similar interpretation of article 2 of the ICCPR.

128 ATSIIC Submission to Senate Legal and Constitutional References Committee Inquiry, *op.cit*, p11.



included in the mandatory sentencing laws.¹²⁹ Likewise, shoplifting, which involves more non-Indigenous juveniles, was not included.

In WA, after excluding the cases of unknown Indigenous status, only 4.7 per cent of fraud offences involved Indigenous people while 42 per cent of vehicle theft and 44 per cent of burglary offences involved Indigenous people.¹³⁰

In its dialogue with the UN Human Rights Committee in July 2000, the Commonwealth Government argued to the Committee that the selection of particular offences as appropriate for mandatory sentencing is a reasonable and legitimate objective of criminal law. Indeed, the Committee has determined that not every differentiation is discriminatory if the criteria for such differentiation are reasonable and objective. However, as discussed in the *Social Justice Report 2000*, this margin of appreciation does not extend to invidious discrimination. Further, mandatory sentences for some of the minor offences under the laws could not be considered reasonable.

ii) The exercise of police discretion

The decisions made at the pre-court level are usually at the discretion of the law enforcement agency. These include:

- whether or not to issue an informal warning at the point of apprehension;
- whether to issue a formal caution or refer to another diversionary program, or to proceed with arrest;
- whether to issue a summons or charge; and
- whether to grant bail and attach conditions to that bail.

Studies have shown Indigenous people are overrepresented, in comparison to their representation in the population, at all stages of the pre-court process.¹³¹ However, decisions made at the pre-court level can influence whether an Indigenous person is more likely to receive a more serious response for the offence. For example, research indicates that Indigenous youth are brought into contact with the criminal justice system earlier than non-Indigenous children and this early 'contamination' contributes to the development of criminal careers.¹³² If diversionary schemes exclude repeat offenders, then it is likely that many Indigenous youth will not benefit from the diversionary process.

This has an impact on mandatory sentencing laws. Diversions do not count as strikes under WA 'three strikes' laws or under the now-repealed NT laws. If Indigenous juveniles are more likely to be formally charged on first or second offences, they are more likely to be counted as repeat offenders for the purposes of sentencing under the mandatory sentencing laws. The coexistence of mandatory sentencing laws and juvenile diversion programs thus runs the risk

129 *ibid*, p11.

130 Ferrante, A, Fernandez, J and Loh, N, *op.cit*, p.50.

131 Cunneen, C, *Conflict, Politics and Crime – Aboriginal Communities and the Police*, Allen & Unwin, 2001, Ch 2; *Bringing them home, op.cit*, Ch 24.

132 Harding, H & Maller, R, 'An improved methodology for analysing age-arrest profiles: application to a Western Australian offender population', (1997), 13, *Journal of Quantitative Criminology*, p369.



of 'bifurcating' juvenile justice, with first time offenders being diverted and repeat offenders, who are largely Indigenous, being perceived by the courts as 'hard core' juvenile offenders.¹³³ This issue will be dealt with in more detail in the next chapter.

iii) Socio-economic disadvantage

The disproportionate impact of mandatory sentencing on Indigenous people cannot be solely attributed to factors which occur from the moment of offending onwards. A range of environmental and socio-economic factors contribute to the shaping of criminal behaviour and can influence the response made by law enforcement agencies.

Environmental factors include the location of the offender. Many Indigenous people in WA and NT live and commit crimes in rural and remote areas. A statistical analysis by NAALAS of a sample of mandatory sentencing cases in the NT revealed that 76 per cent of defendants were from remote areas, and 70 per cent involved offences committed in remote areas.¹³⁴ In WA, two thirds of juveniles jailed under the laws come from rural areas.¹³⁵ The type of offence and the likelihood of being detected may differ considerably depending on the size of the community, services in the community and opportunities to offend.

Socio-economic factors play a large role in determining rates of offending. The disadvantaged position of Indigenous people is well-documented. It is reflected in a lack of employment opportunities, inadequate housing, educational disadvantage, poverty, high rates of substance abuse and lack of access to essential services, especially in remote areas. Poverty and boredom have both been cited as reasons for property offences among youth in the NT.

An examination of young male attitudes to detention in remote communities reveals that laws can be ineffectual when they are imposed without attention to the social, economic and cultural context of the offenders. In the NT, for example, there are many reports that young Indigenous offenders from remote communities view detention as a positive experience because it provides them with status and access to resources not available in their communities. In Alice Springs we were told by young Indigenous offenders that Don Dale Juvenile Detention Centre is not so bad and that they have good sporting facilities. On Groote Eylandt we were told that for young people, detention in Darwin was the only opportunity to experience a plane flight. Others have gone so far as to suggest that detention is a replacement rite of passage.¹³⁶

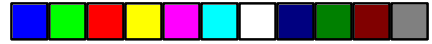
However, as Emma Ogilvie and Allan Van Zyl point out from their current study of young offenders in the NT, detention is not a replacement rite of passage but rather provides an 'opportunity for a *different experience* from that available in the remote communities'. This point is critical because:

133 Blagg, H & Wilkie, M, 'Young people and policing in Australia: the relevance of the UN Convention on the Rights of the Child', (1997), 3(2), *Australian Journal of Human Rights*, p.58.

134 Sheldon, J & Gowans, K, *op.cit*, p2.

135 Department of Justice (WA), *op.cit*.

136 See Emma Ogilvie and Allan Van Zyl, Young Indigenous Males, Custody and the Rites of Passage, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No.204, April 2001.



While there may be issues of status associated with incarceration, the adolescent criminality in the Northern Territory is primarily born out of boredom, resulting from marginalisation and lack of access to resources ... The attractions of detention ... are therefore seen by some as compelling.¹³⁷

The importance of recognising the social context of these young Indigenous males is hence extremely important for crime prevention policy. If detention has become a routine means for marginalised and disadvantaged young Indigenous people to access a different experience, it is questionable whether this functions as a deterrent at all. Further, once young people are incarcerated, it becomes another means of constructing identity within a detention environment. This raises policy challenges to provide the experience they seek in other ways. Addressing economic, social and educational issues must be a priority in any crime prevention strategy. This approach ought not to be undermined by superficial laws which pull communities apart rather than bring them together. Australia has an obligation, under article 2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), to realise progressively the economic, social and cultural rights of all Australians. Related to this principle is the obligation to ensure that adequate programs are developed and implemented to counter the marginalization of a specific sector of society, as well as ensuring that the level of rights enjoyed does not fall below a core minimum level. This is of particular relevance to remote and regional areas in the NT and WA.

In 2000/01, the Australian Bureau of Statistics was contracted to compile an Experimental Index of Socio-Economic Disadvantage by the Commonwealth Grants Commission for its inquiry into relative Indigenous need. The index shows where Indigenous disadvantage and need is greatest on a national scale, by ATSI regions.¹³⁸ Regions are ranked as 'most disadvantaged', 'more disadvantaged', 'less disadvantaged' and 'least disadvantaged'. Regions in WA and the NT account for eight of the nine regions in the 'most disadvantaged' category, as well as the two of the nine regions in the next category of 'more disadvantaged'.¹³⁹

Similarly, our consultations in the NT on juvenile diversion revealed that substance abuse and family violence are key factors in juvenile offending behaviour. According to the NAALAS study of mandatory sentencing cases in the NT, 63 per cent of defendants were affected by substance abuse, including alcohol and petrol.¹⁴⁰

In WA, substance abuse was identified in 55 of 110 juvenile cases surveyed by the Aboriginal Legal Service of WA.¹⁴¹ These figures indicate the necessity for

137 *ibid*, p4.

138 Commonwealth Grants Commission, *Final report on Indigenous funding*, CGC, Canberra, 2001, pp31-34.

139 *ibid*, p32.

140 Sheldon, J & Gowans, K, *op.cit*, p2.

141 Aboriginal Legal Service of WA and the WA State Policy Office of ATSI Submission to the Senate Legal and Constitutional References Committee *Inquiry into the Provisions of the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*, Submission 47, p10.



the development of alternatives to incarceration as a response to substance abuse. For example, although a high number of home burglaries in WA are committed by drug users, repeat burglary offenders are automatically precluded from the new WA Drug Court.¹⁴²

The laws in both the NT and WA can be said to target a pattern of offending that is often brought about by socio-economic disadvantage, which makes Indigenous people more vulnerable to imprisonment under the laws and which can influence Indigenous over-representation in offending patterns. The impact of disadvantage on offending patterns is accepted as a key challenge by all governments in their crime reduction strategies. However, initiatives to date have clearly failed to reduce overall crime in any significant way.

Conclusion

From whatever perspective they are examined, mandatory detention laws in WA and the NT are bad law. They are ineffective in deterring crime and rehabilitating offenders, they are costly and they are manifestly unjust.

The WA provisions are more complex than those in the NT and have avoided much scrutiny because of this. But we must remember that the WA provisions impose much harsher penalties on juveniles than the NT laws ever did – 12 months minimum detention as opposed to 28 days. Like the NT provisions, the WA laws have resulted in situations of injustice, with individuals receiving sentences that are disproportionate to the circumstances of their offending.

I applaud the new NT Government for acknowledging this and repealing the provisions. Once more, I call for the WA Government to repeal its mandatory detention provisions and for the federal Parliament to exercise its responsibilities to ensure compliance by the WA Government with Australia's international human rights obligations by overriding the laws if necessary.

As the introductory chapter of this report notes, in the context of 10 years since the Royal Commission, we must remain alive to the consequences of these laws. The removal of young people to detention centres and prisons far away from their communities has a particularly painful resonance for Indigenous families and communities. The *Bringing them home* report outlined the impact that child removal policies have had in the past.¹⁴³ As one submission to that inquiry stated, 'The juvenile justice system is mimicking the separation policies of the past'.¹⁴⁴

In our consultations with people in the NT, older Indigenous people in particular express pain and sorrow that the younger members of the community cause trouble, and are fearful of the long term consequences for community and cultural life. It must be remembered that many of the victims of property crime and violent crimes are Indigenous people themselves. It is in the communities' interests to prevent crime. When all else seems hopeless, some Indigenous people have asked for key troublemakers to be taken away to detention. This is a sign of desperation, not of choice.

¹⁴² Department of Justice (WA), *op.cit.*, p.22.

¹⁴³ *Bringing them home*, *op.cit.*, p596.

¹⁴⁴ *ibid.*, p24. WA Legal Service (Broken Hill) Submission 775 to the Inquiry.



In remote communities the mandatory sentencing laws are seen as yet another law which has been imposed on them from outside. They have become synonymous with imprisonment and removal overall. Imprisonment is not seen as the solution to offending behaviour and does not make offenders accountable to the Aboriginal community. Communities have been struggling daily with levels of criminal activity, and have asked for help to address the underlying causes of crime and social breakdown. While there are many good initiatives in the NT and WA which have begun to address these issues, the introduction of mandatory sentencing laws runs counter to these efforts. Both literally and symbolically, the laws undermine Indigenous and non-Indigenous attempts to redress the inequality in Australian society.







Chapter 5

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Juvenile diversionary schemes and Indigenous people

Introduction

On 27 July 2000, the Commonwealth government and the Northern Territory Government signed an agreement for the establishment of a juvenile pre-court diversion scheme in the Northern Territory (NT). This agreement arose specifically as a response to the continued criticism of the NT's mandatory minimum imprisonment laws and their impact on juveniles and Indigenous people. By establishing the pre-court juvenile diversionary scheme, the NT has belatedly joined most other states and territories in Australia in providing such options for dealing with juvenile offenders. This chapter examines the first year of operation of the NT's pre-court diversionary scheme. It also examines diversionary options in Western Australia (WA). It assesses these schemes against human rights standards, as well as in the context of developments in other jurisdictions in Australia and overseas.

Diversion and restorative justice

Diversion is the term applied to various measures to 'divert' offenders from the formal criminal justice system. A range of diversionary options exist for young offenders in Australia, although the extent of their use varies considerably between jurisdictions. Options for diversion include verbal and written warnings, formal cautions, victim-offender or family conferencing and referral to formal or informal community-based programs. There are also innovative sentencing mechanisms such as circle sentencing and drug courts, which divert offenders from the normal court sentencing process.

Juvenile diversionary programs have been developed in recognition that 'contact with the formal system can contaminate young people who would otherwise avoid involvement in further criminal activity if just left alone'.¹ They are intended:

¹ Blagg, H and Wilkie, M, *Young People and Police Powers*, Australian Youth Foundation, Sydney 1995, p56.



to avoid the danger of trapping young people with a previously good record in a pattern of offending behaviour. They seek to temper the punitive nature of criminal justice processes in recognition of the particular vulnerabilities of juvenile offenders. For example, cautioning a young person for a minor offence indicates clearly that his or her behaviour is unacceptable. However, it avoids the stigma associated with prosecution and conviction and avoids contaminating a minor first offender through contact with serious or recidivist offenders.²

There has been increased focus on diversion in the 1990s as models of restorative justice. The most widely accepted definition of restorative justice is that it is 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future'.³ Restorative justice processes seek to ensure that offenders are able to accept responsibility for their offending behaviour and the impact of this on the community and any victims. Reparation and restitution are more important under this model than punishment.

One of the most intensive forms of diversion to emerge under this model in the early 1990s has been conferencing. This practice began in New Zealand and has offered a particular rich source of ideas about how restorative justice could be given practical expression with young people. According to Van Ness, Morris and Maxwell conferencing involves:

not only the primary victim and offender, but also secondary victims (such as family members or friends of the victim) as well as supporters of the offender (such as family members or friends). These people are involved because they have also been affected in some way by the offence, and because they care about one of the primary participants. They may also be involved in carrying out the final agreement.⁴

The conference provides a forum for restorative solutions to emerge. Proponents stress that conferencing is not a soft option. It directly confronts young people with the human consequences of their behaviour and provides avenues for direct reparation and restitution for victims. The agreements reached by conferences can be tailored to meet the direct wishes of participants and often involve the offender in community work, a direct apology to the victim and some kind of – often symbolic – restitution. Families of offenders may leave the conference empowered by the process, having re-claimed control over their children.

There are now two (sometimes seemingly contradictory) ways of seeing diversion. The first is relatively minimalist: diversion is about giving first or minor offenders 'a second chance'. The second is more radical and ambitious: diversion becomes not just a mechanism for re-routing individual cases away from contact with the existing criminal justice system but a vehicle for directing cases into an alternative process of community based justice.

2 *Seen and heard, op.cit*, para 18.36.

3 Marshall, T, 'Criminal mediation in Great Britain' (1996), 4(4), *European Journal on Criminal Policy and Research*, p37.

4 Van Ness, D, Morris, A, and Maxwell, G, 'Introducing restorative justice' in Morris, A and Maxwell, G, (eds) *op.cit*, p7.



Human rights principles for juvenile diversion

The UN *Convention on the Rights of the Child* (CROC) recognises the importance of diverting young offenders from the formal processes of the criminal justice system. CROC was adopted in 1989 and ratified by Australia in 1990. Article 40.3 establishes a clear preference for alternative diversionary measures over formal judicial proceedings. Diversion is primarily seen as occurring prior to the formal adjudication of the case. The Convention states that:

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular... Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

The obligation in CROC to develop diversionary options is elaborated upon by several United Nations rules and guidelines, namely:

- UN *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (Beijing Rules);
- UN *Standard Minimum Rules for Non-Custodial Measures* 1990 (Tokyo Rules);
- UN *Guidelines for the Prevention of Juvenile Delinquency* 1990 (Riyadh Guidelines); and
- UN *Rules for the Protection of Juveniles Deprived of Their Liberty* 1990.

Diversionary options must also pay regard to Australia's general human rights obligations under CROC, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR).

These international standards establish principles for the development of diversionary options. Many of these principles have also been elaborated on with particular reference to Indigenous juveniles by the Royal Commission into Aboriginal Deaths in Custody and the *Bringing them home* and *Seen and heard* reports.⁵ The following table outlines the basic requirements for diversionary schemes.

Best practice principles for juvenile diversion⁶

1. Viable alternatives to detention

Diversion requires the provision of a wide-range of viable community-based alternatives to detention. Diversion programs should be adequately resourced to ensure they are capable of implementation, particularly in rural and remote areas. Diversion should be adapted to meet local needs and public participation in the development of all options

⁵ RCIADIC, *op.cit*; *Bringing them home*, *op.cit*; *Seen and heard*, *op.cit*.

⁶ For further details see: Human Rights and Equal Opportunity Commission, *Human Rights Brief No.5, Best practice principles for the diversion of juvenile offenders*, HREOC, Sydney, 2001.



should be encouraged. There should be adequate consultation with Indigenous communities and organisations in the planning and implementation stages.

2. Availability

Diversionary options should be available at all stages of the criminal justice process including the point of decision-making by the police, the prosecution or other agencies and tribunals. Diversion should not be restricted to minor offences but rather should be an option wherever appropriate. The decision-maker should be able to take into account the circumstances of the offence. The fact that a juvenile has previously participated in a pre-court diversionary program should not preclude future diversion. A breach of conditions should not automatically lead to a custodial measure.

3. Criteria

Agencies with the discretionary power to divert young people must exercise that power on the basis of established criteria. The introduction, definition and application of non-custodial measures should be prescribed by law.

4. Training

All law enforcement officials involved in the administration of juvenile diversion should be specifically instructed and trained to meet the needs of young people. Justice personnel should reflect the diversity of juveniles who come into contact with the system.

5. Consent and participation

Diversion requires the informed consent of the child or his or her parents. Young people should be given sufficient information about the option. They should be able to express their views during the referral process and the diversion process. Care should be taken to minimise the potential for coercion and intimidation of the young person at all levels of the process.

6. Procedural safeguards

Diversionary options must respect procedural safeguards for young people as established in CROC and the ICCPR. These include direct and prompt information about the offences alleged, presumption of innocence, right to silence, access to legal representation, access to an interpreter, respect for privacy of the young person and their family and the right to have a parent or guardian present. A child should not acquire a criminal record as a result of participating in the scheme.

7. Human rights safeguards

CROC also requires that the best interests of the child be a guiding factor; the child's rehabilitation and social reintegration be promoted, with attention to their particular vulnerability and stage of maturation; the diversionary option applies to all children without discrimination of any kind, including on the basis of race, sex, ethnic origin and so on; the diversionary option is culturally appropriate for Indigenous children and children of ethnic, religious and cultural minority groups; and the diversionary option is consistent with prohibitions against cruel, inhuman or degrading punishment.

8. Complaints and review mechanisms

The child should be able to make a complaint or request a review about the referral decision, his or her treatment during the diversionary program and the outcome of his or her participation in the diversionary option. The complaint and review process should be administered by an independent authority. Any discretion exercised in the diversion process should be subject to accountability measures.



9. Monitoring

The diversionary scheme should provide for independent monitoring of the scheme, including the collection and analysis of statistical data. There should be a regular evaluation conducted of the effectiveness of the scheme. In reviewing options for diversion, there should be a role for consultation with Indigenous communities and organisations.

The right to self-determination is also central for Indigenous peoples in the context of criminal justice issues. Article 1 of the ICCPR and Article 1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) assert that all peoples have the right to self-determination. RCIADIC prescribed self-determination as being necessary for Indigenous people to overcome their previous and continuing, institutionalised disadvantage and domination.⁷ The *Bringing them home* report recommended that self-determination in relation to juvenile justice issues be implemented through national framework and standards legislation.⁸

Juvenile diversion schemes in the Northern Territory and Western Australia

All Australian states and territories offer some form of diversionary programs for juveniles, and some offer diversionary options to adults. This report focuses on juvenile diversion schemes in NT and WA. A brief overview of schemes in all other states and territories of Australia as well as New Zealand is included in Appendix One of this report. That overview reveals that there are many common features to diversionary approaches across jurisdictions, despite differences in emphasis and detail.

Juvenile diversion in the Northern Territory

The NT has one of the highest rates of juvenile detention in corrective institutions in Australia.⁹ Indigenous people represented approximately 73 per cent of juvenile detainees in the NT in June 2000.¹⁰ The potential of juvenile diversionary mechanisms to break the cycle of juvenile offending has only been introduced relatively recently in the NT, ironically as a means to temper the impact of mandatory sentencing legislation on juveniles. The NT system currently offers both pre-court and post-court diversion for juvenile offenders. An evaluation of the NT scheme needs to bear in mind that the scheme is relatively new. This chapter examines the model of diversion in the NT and makes some preliminary observations on the operation of the scheme so far.

7 RCIADIC, *op.cit*, Vol 1, para 1.7.6.

8 *Bringing them home*, *op.cit*, recommendations 43-53.

9 Since 1995 until 2000, NT has had the highest rate of detention per 100,000 of relevant population in Australia. At 30 June 2000 the rate per 100,000 in NT was 60.70, the second highest rate in Australia. Tasmania had the highest rate at 66.46. Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions 1981-2000*, AIC, Canberra, 2001, Table 1(c), p5.

10 NT Correctional Services, Annual Report 1999-2000, *op.cit*, p47.



Pre-court diversionary options for juveniles in the NT

The first trial of pre-court diversion took place in the NT in 1995-96, when NT Police ran 34 conferences based on the 'Wagga model' in Alice Springs and Yuendumu.¹¹ An evaluation report of the trial recommended that the program be implemented throughout the Territory.¹² The scheme was not expanded beyond the initial trial.

The latest juvenile pre-court diversion scheme came about because of public pressure on the federal and NT governments to repeal mandatory detention laws. The two governments reached an agreement in April 2000 which provided that the NT would keep the laws, but would also introduce an Aboriginal interpreter service across the Territory and diversionary programs for juveniles with funding from the federal government.

The scheme began operation in the NT on 24 August 2000 after the Commissioner of Police gazetted an Interim Policy Statement.¹³ The *Police Administration Act 1978* (NT) was then amended in October 2000 to include a new division on the diversion of juvenile offenders. In his second reading speech, the Police Minister stated:

The scheme is not a soft option. It is not a let-off. The aim is recognition by the offender of wrongdoing, with reparation to repair the harm to the victim and community. The juvenile diversion scheme does not change this government's views on crime and those serious offenders who continue to break our laws. The principles of this scheme are to treat young people fairly, reduce youth crime, support and involve victims, encourage parental responsibility, foster even closer police and community interaction and foster positive social change.¹⁴

The diversionary scheme is administered by the newly created Juvenile Diversion Division of NT Police under the direction of a Superintendent. Juvenile Diversion Units in Darwin and Alice Springs coordinate the application of the scheme. In most communities, the officer in charge of the police station is responsible for the diversionary scheme – including in the identification, development and monitoring of diversionary programs.¹⁵

The scheme requires police to divert a juvenile who has committed a 'minor' offence. Although not enshrined in legislation, this requirement was later detailed in the Police General Orders and is reinforced in Police Gazette Notices, training courses and instructional material.¹⁶ That police *must* divert minor offences

11 For discussion of the Wagga model see Appendix One of this report.

12 Fry, D, *A Report on Community Justice Programme 'Diversionary Conferencing Police Trial Alice Springs region*, NT Police, Darwin, 1997.

13 Northern Territory Police, *Juvenile Pre-Court Diversion Scheme: Overview*, in use at February 2001, p1.

14 Mr Reid, *Hansard*, Legislative Assembly (NT), 11 October 2000: <http://notes.nt.gov.au/lant.hansard>. This second paragraph appears almost verbatim in the Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 para 1.3.

15 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 para 2.9.

16 *ibid*, para 5.1, 'Under the terms of the Agreement with the Commonwealth, police must divert a juvenile who has committed a 'minor offence' in circumstances where the juvenile and a parent/guardian have consented to the diversion'.



mitigates against any potential negative effects of police discretion. However, it must be noted that minor offences are defined fairly narrowly as property offences where the value of the property do not exceed \$100, and does not include unlawful entry.¹⁷

Discretion is also provided to the police to divert a juvenile who has committed a more serious offence. Despite the scheme being established in response to concerns about mandatory detention laws and the limits placed on offences eligible for post-court diversion, the range of offences which can be diverted is not limited to those offences which formerly attracted a mandatory term of imprisonment. There are, however, a range of excluded offences which are scheduled in the Police Commissioner's General Order.¹⁸ These include serious matters such as homicide, sexual assault, causing grievous harm, robbery and driving under the influence.

Section 120H of the *Police Administration Act 1978* (NT) states that, instead of laying a charge, a member of the Police Force who believes 'on reasonable grounds' that a person under 18 has committed an offence can provide the person with a verbal or written warning, formal caution, or refer them to a diversionary program. The legislation does not define or give examples of what 'reasonable grounds' police may rely on in making this decision. It also does not require a formal admission of guilt by the young person. The Police Commissioner's General Order states:

This approach will allow for those occasions where a juvenile will not make formal admissions but informally acknowledges some guilt. In particular, it allows for a verbal/written warning where no positive outcomes would be achieved by pursuing the matter through the formal justice system eg the offending juvenile has been positively identified by witnesses (eg street offence) but will not formally admit to the offence.¹⁹

This is in contrast to other statutory-based schemes in Australia.²⁰ Prior to the repeal of mandatory imprisonment laws, there was a risk that young people would agree to participate in diversionary options for crimes they had not committed rather than risking a mandatory custodial penalty in court. The Police Commissioner's General Order seeks to prevent the offering of diversion as such an inducement:

Diversion should not be discussed with a juvenile or parent/guardian until the investigation is complete. Members must take particular care to ensure that diversion is not used as an inducement to elicit an admission.²¹

17 Agreement between the Commonwealth and the Northern Territory, attached to Joint News Release, Commonwealth Attorney-General and Northern Territory Chief Minister, 27 July 2000. See 'Basis of Agreement'.

18 Police Commissioner's General Order J1 – Juvenile Pre-court Diversion in force at 15 March 2001, Schedule A.

19 *ibid*, para 6.11.1.

20 For example, in NSW the young person must have made an admission to all elements of the offence in the presence of an independent adult before a referral can be made: *Young Offenders Act 1997* (NSW) ss36(b), 10. See further Appendix one of this report.

21 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001.



The Police Commissioner's General Order states that in deciding whether to divert a young person, the police officer should consider the following factors:

- 1) the young person's understanding of the offence and acknowledgment of responsibility;
- 2) recovery of any property stolen or appropriate restitution for the cost of any theft or damage;
- 3) the circumstances and seriousness of the offence including the level of any violence, the harm or loss to the victim and the age of the young person;
- 4) the victim's view of any intended course of diversion;
- 5) the parent or guardian's view of any intended course of diversion;
- 6) whether consent to diversion has been given by the young person, and by a parent where required;
- 7) the suitability of the young person to undertake diversion including the best interests of the child and his or her community and any relevant cultural or religious considerations;
- 8) previous offences by and diversions of the young person; and
- 9) any other matters which the member may reasonably consider as relevant, including but not limited to the public interest.²²

A juvenile can be considered for diversion where they are already the subject of a community-based court order, such as a good behaviour bond or probation.²³ Diversionary options, other than verbal warnings, cannot be used unless the young person and a parent consent.²⁴ At any time during the diversion process, the young person or parent can elect to have the matter dealt with by a court.²⁵

Once a diversion is completed 'to the satisfaction of a member of the Police Force', no further action or proceedings can be taken in respect of the matter.²⁶ This reflects the common law principle of double jeopardy that a person cannot be dealt with twice for the same crime. However, the police history of diversions can be produced to a court for the purpose of determining the appropriate sentence if the diversion is unsuccessful or for any subsequent sentencing.²⁷

If a young person is referred to diversion but does not comply with the arrangements made by the Juvenile Diversion Unit, s/he is then referred for prosecution. By the same token, prosecution files may be returned to the police where the young person admits the offence at a later stage, such as after legal advice:

Where a juvenile has commenced the diversion process and further information or evidence comes to hand in respect of a more serious nature of the offence or of further offences, the diversion process should be

²² *ibid*, para 6.2.1.

²³ *ibid*, para 6.20.1. Good behaviour bonds are imposed under s53(1)(d) of the *Juvenile Justice Act 1983* (NT) and are unsupervised. Probation orders are made under s53(1)(f) under that Act and are supervised by NT Correctional Services.

²⁴ *Police Administration Act 1978* (NT), s120J.

²⁵ Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 para 5.6.

²⁶ *Police Administration Act 1978* (NT), s120K.

²⁷ *Police Administration Act 1978* (NT), s120M.



stopped and the normal course of investigation followed... Dependent on the nature and seriousness of the further admissions or evidence, diversion may still be appropriate and the process may continue.²⁸

Where diversion is refused, the reasons must be recorded on the prosecution file and in the police database.²⁹

Forms of diversion

The *Police Administration Act 1978* (NT) identifies four stages of diversion, which apply to situations of varying levels of seriousness.³⁰

Verbal warnings are seen as appropriate for trivial or very minor offences that are included in Traffic Regulations or Summary Offences Regulations.³¹ This encompasses offences for which an infringement notice is usually issued, such as speeding, not wearing a seatbelt, riding a bicycle without a helmet, unlicensed driving, offensive conduct, offensive language and damaging a public fountain.³² There is no bar to subsequent verbal warnings being given provided the circumstances are appropriate in the opinion of the informant police officer.³³ This is the only diversion that can be conducted without the consent of a parent or guardian.

Written warnings are considered appropriate for trivial or very minor offences where the young person is 'at greater risk because of his/her behaviour and a higher level of intervention is necessary'.³⁴ A written warning can be given by the police officer for all offences that are covered by verbal warnings and for first time 'minor offences' where the property is recovered or appropriate restitution is made and the young person acknowledges responsibility for the offence.³⁵ For all other offences, the informant must get the approval of an authorised officer (a senior sergeant or above, or the officer in charge of the station) before a written warning is issued.

A copy of a written warning must be served on the parents or guardians of the young person 'to inform them of the behaviour of the juvenile and to further encourage parental responsibility'.³⁶ Conditions can be placed on the warning provided they are not 'onerous or impracticable' and can be easily understood and complied with by the young person in a short period of time.³⁷ Written warnings seem designed to replace commissioned officers' cautions, which

28 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 para 6.11.3-4.

29 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 para 6.18.4.

30 *Police Administration Act 1978* (NT), s120H.

31 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001, para 6.3.1.

32 *ibid*, para 6.16.2.

33 *ibid*, para 6.3.3.

34 *ibid*, para 6.3.5.

35 Minor offences are defined as property offences, other than unlawful entry with intent, where the value of the property does not exceed \$100: *ibid*, para 6.3.6.

36 *ibid*, para 6.3.5.

37 *ibid*, para 6.3.7.



have been in use in the NT for some time and have been governed by a Police Commissioner's General Order since 1 June 1998.³⁸

The Police Commissioner's General Order states that a **formal caution** should be given 'in more serious circumstances where verbal or written warnings have previously proven to be ineffective'. Cautions may also be used for first offenders where 'a more formal intervention at an early stage would achieve effective results'.³⁹ There are no criteria for officers to make such determinations.

Formal cautions can be delivered by senior police officers or community leaders such as Indigenous elders or religious leaders who are 'most likely to have an impact upon the juvenile's behaviour, and where necessary, the responsible behaviour of the parents/guardians'. If the caution is delivered by a member of the Police Service, it must be by an authorised officer.⁴⁰ A copy of the caution must be served on the young person's parent or guardian and the details of the caution recorded on the police database, PROMIS.⁴¹

Police can impose any conditions they consider appropriate on the caution, such as work for the victim, restoration of damage, or a verbal or written apology to the victim. This is contrast to other jurisdictions where the conditions that can be included in a caution are more limited.⁴² A number of the other conditions suggested by police are the types of restrictions that would usually only be attached to bail, such as the imposition of a curfew and an agreement not to associate with certain peers. Presumably time limits would be set for such conditions but the process is not clear from the General Order.

The Northern Territory Police Force makes frequent references to **family conferencing** as one of its diversionary options.⁴³ There is no mention of this option in the *Police Administration Act 1978* (NT) nor in the Police Commissioner's General Order. In practice family conferences are similar to cautions and involve a meeting between the police, the young person and his or her family.⁴⁴ They can work like victim/offender conferences (without the victim) and outcomes are referred to as personal programs. Many are informal and are designed to suit the individual.

Referral to a program is the most onerous option available. Program options include victim/offender conferences, community based programs and drug and alcohol rehabilitation programs.

Victim/Offender conferences require young people to participate in meetings with the police and the victim of the offence. Such diversion is particularly suitable where the young person has committed more serious offences or is a recidivist.⁴⁵

38 Police Commissioner's General Order C1 – Children in force at 1 June 2000 paras 7.1.1-7.1.8.

39 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001 in force at 15 March, para 6.4.1.

40 *ibid*, para 6.4.2. Para 4.4 defines 'authorised officer'.

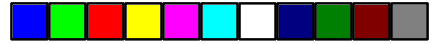
41 *ibid*, para 6.5.2.

42 For example, in NSW the only condition that can attach to a caution is a written apology: *Young Offenders Act 1997* (NSW) s29(4), (5).

43 The NT Police 'Guidelines for the Administering of Warnings, Formal Cautions/Family Conferences and Victim Offender Conferences using Restorative (and Shaming) techniques', April 2000 includes a typical example of a family conference/caution process.

44 There are plans to amend the General Orders to rename formal cautions as family conferences.

45 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001, para 6.6.1.



The Police General Order, however, also sees conferences as the main option for diversion:

Wherever possible, a victim offender conference should be strongly considered as the first option including circumstances where a written warning, formal caution or referral to more formal diversions is being considered.⁴⁶

Unlike other jurisdictions, conferences can only be held where the young offender *and* the victim agree to attend.⁴⁷ The procedures at the conference are intended to be flexible and outcomes are not restricted in any way: 'The success of a conference will depend on the ability of the participants to communicate their feelings and express complex issues freely and fully in their preferred language'.⁴⁸

The General Order lists a number of factors that informants should take into account when deciding whether a young person is suitable to participate in a victim/offender conference, namely:

- whether the young person would gain greater benefit from the exposure to the victim or family or both in a conferencing environment;
- whether the presence of the victim and the telling of the victim's story would be more effective in getting the young person to recognise the wrong of their actions, the harm caused to the victim and the taking of responsibility for their actions; and
- whether the presence of the family of the young person and the subsequent shame caused to the young person would have a greater impact on his/her future behaviour.⁴⁹

The young person is expected to make amends to the victim and take responsibility for the offence. According to police in the Juvenile Diversion Division, the outcomes of a conference must be agreed to unanimously but this is not stipulated in the legislation or relevant standing order. Conditions can be imposed on a young person during the conference process in the same way as under a formal caution. For example, s/he could be required to write an apology to the victim and do some voluntary work at the victim's local community centre. Diversion to a conference can be combined with referral to a community based program or a substance abuse program.⁵⁰

NT case study

In Tennant Creek, four young people were arrested in relation to the same offence. Two attended a victim/offender conference in which 24 other people participated and agreed to attend a two month program. The other two young people were sentenced to good

46 *ibid*, para 6.6.1.

47 For example, in NSW and Victoria any victim of the offence or his nominated representative is entitled to attend a conference but his decision not to attend does not stop the process: *Young Offenders Act 1997 (NSW) s47(1)(i)*.

48 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March, *op.cit*, para 6.6.3.

49 *ibid*, para 6.6.4.

50 *ibid*, para 6.6.2.



behaviour bonds at Court. The first two young people had a far more onerous path. This illustrates that diversion is not simply an 'easy option' for young offenders. It also illustrates the need for legal safeguards to ensure that a young offender is not required to fulfil conditions which are unreasonable or more onerous than he or she might have received at court.

Young people can also be referred to a *community based program* from a formal caution, a victim offender conference or a family conference. The young person's needs are assessed by the closest Juvenile Diversion Unit. In remote communities assessments are made by the officer in charge of the police station in consultation with the relevant Juvenile Diversion Unit and the program provider.⁵¹

The Police Service can make referrals to a broad range of community based programs provided they have been formally approved and registered by the Superintendent responsible for the Juvenile Diversion Division. Young people cannot participate in any such program without the approval of a Senior Sergeant or the Superintendent of the Juvenile Diversion Division. The officer in charge of the relevant police station and the Juvenile Diversion Unit 'jointly determine' how long a young person should stay on a program.⁵² Young people participating in programs are monitored by a Juvenile Diversion Unit or the officer in charge of the local station: '...where the juvenile does not comply with the arrangements, action will be taken immediately'.⁵³

The service provider must notify the referring police station if a young person does not attend a program or leaves it without permission. The service provider must also notify the Juvenile Diversion Unit or referring police station if a young person 'reveals the commission of a serious criminal offence while attending the Program'.⁵⁴ Several organisations in the NT state that they are reluctant to receive diversion referrals because they are wary of placing themselves in a compromising position between police expectations and their responsibilities towards their clients. Particular concerns which were raised concerned obligations of confidentiality, particularly for any therapeutic counselling process, and obligations to notify non-attendance or breaching which may be counter-productive to the young person's development and break a relationship of trust. Other youth program workers spoke of the difficulty of evaluating whether outcomes of the program had been met. It is necessary to have clear agreement between the police and the program coordinator of an appropriate outcome. What is considered a reasonable achievement, and the time frame allocated to achieve it, may differ markedly between individuals and persons of different backgrounds.

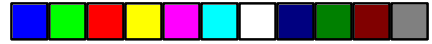
At June 2001, 90 programs throughout the Northern Territory had been registered by police for the purposes of pre-court diversion. Many are the same programs used by NT Correctional Services for post-court diversion. Although the original

51 *ibid*, para 6.7.3-4.

52 *ibid*, para 6.7.1-2.

53 *ibid*, para 6.7.5.

54 Northern Territory Police *Juvenile Pre-Court Diversion Scheme: Overview* in use at February 2001, attachment clause 5(1), (2).



Commonwealth-NT agreement stipulated that funding be applied to Juvenile Diversion Units for the purchase and provision of community-based diversionary programs (and to the NT Treasury for the purchase by agencies of community-based and drug and substance abuse diversionary programs), there does not appear to have been any funding provided for the establishment of programs for pre-court diversion. However existing programs, such as those outlined below, have been funded by the police for individual referrals.

The Police Commissioner's General Order provides no guidance on referrals to **drug and alcohol rehabilitation programs**. A number of Aboriginal communities have set up local programs to help young people to stop sniffing petrol and other solvents. For example, the Mt Theo petrol sniffing program for young Indigenous petrol sniffers has been operating for several years at Mt Theo outstation, northwest of Yuendumu. However, this was one of the only ongoing programs aimed specifically at young petrol sniffers in Central Australia.

All groups and individuals consulted in the Northern Territory stated that inhalant abuse, particularly petrol sniffing, is a major health problem in many remote and urban Aboriginal communities. Many observed that increasingly it is very young children aged 7-12 who are becoming involved in sniffing. The Commission conducted focus groups with young Aboriginal people aged 12-17 in Alice Springs on 23 July 2001 and 27 July 2001 who identified alcohol, cannabis and petrol sniffing as the main drugs used by young Indigenous people. There is often a clear link between petrol sniffing and criminal behaviour as one of the effects of intoxication is a reduction of inhibitions and an impaired ability to reason.

Our consultations with the NT Police Force revealed that they are in the preliminary stages of establishing *community youth development units* in key regional areas. The aim of these units is to provide a holistic approach to service delivery in the region, by being able to match the needs of young people referred to the unit for assessment with appropriate local agencies or programs. This initiative, if appropriately organised in consultation with communities, may utilise community expertise on juvenile needs more than police assessments.

Program Case Studies

This section provides examples of four programs which specifically assist Indigenous young people in the NT. The programs are either accredited for referral by the Juvenile Diversion Unit, or there is a possibility they will operate as a juvenile diversion program in the future.

n The Gap (Alice Springs)

The Gap Youth Centre Aboriginal Corporation was established in 1978. The focus was originally on sport and recreation but in recent years the Centre has become a resource centre offering a range of education and support programs. For example, the Gap runs an alternative education program for students aged 12 to 20 for whom mainstream schooling is inappropriate, such as young mothers and those with poor literacy. The Centre also has a dance and arts program, a mentoring program and a support program for homeless young people.



At June 2001, the Gap Youth Centre had hosted six young people on pre-court diversion programs and one young person on a post-court program. Programs involve daily attendance for between two and six weeks. Most young people who have completed a program continue to use the Centre after their attendance is no longer required.

Youth workers at the Centre have indicated that young people who commit offences usually face a large number of complex and inter-related social problems including lack of adequate housing and income support, family breakdown, and domestic violence. Their knowledge of their rights and responsibilities under the law and their understanding of police and court processes in general is extremely limited.

n *Community Development Unit (Tennant Creek)*

The Community Development Unit (CDU) is a youth program managed by the Tennant Creek and Barkly Social Behaviour Issues Group (TCBSBIG), and auspiced by Anyinginyi Congress. The Issues Group is composed of representatives from the town, including Anyinginyi Congress, Julalikari Council Aboriginal Corporation, NT police, Tennant Creek Town Council, the Department of Sports and Recreation, NT Health, Aboriginal Legal Aid and local schools.

CDU provides a range of activities and programs for young people (12-17 years) who may be at risk and who experience barriers to accessing the mainstream education system. Programs include art and craft, sport, cooking classes, development of a radio show and pre-employment training program at NT University. The CDU also attends the monthly juvenile court and works with Aboriginal Legal Aid to support juvenile offenders. Young offenders have been supported to attend and complete Community Service Orders and have been successfully diverted to CDU programs by the court.

In October 2000 the CDU was also approved as a diversionary program for the pre-court juvenile diversion scheme. It is funded by the police for each young offender managed on a program (approximately \$450 for a 3 month program). To date, 2 young men and 3 young women have been diverted to the CDU. Youth workers at CDU seek to provide a supportive environment for a young person who has been diverted:

There can be any number of reasons a young person is unable to attend a Diversion program on a given day. We have found it important to continue to support the young person even if they have a period of non-attendance. Normally at this stage it is important to involve parents, guardians and any other family members to reinforce the importance of attending and the repercussions for non-attendance.

Our experience is that most young offenders want to be 'finished' with the whole business. Diversion appears to have offered a structure that they understand. They understand when there is unfinished business. They look forward to the time when their individual matters are complete or 'finished' and there is not the pressure of a court appearance hanging over them.⁵⁵

55 Notes on CDU by Patrick McCloskey, previous Youth Development Worker, supplied by CDU.



n ***Intjartnama Aboriginal Corporation (Ntaria – Hermannsburg – Alice Springs)***

Intjartnama is an Aboriginal family-run outstation situated west of Alice Springs towards Hermannsburg.⁵⁶ The owner of the outstation set up an alcohol rehabilitation centre there with her husband more than 10 years ago. They were able to access a variety of funding to support the programs on the outstation. Today Intjartnama receives some funding from the Commonwealth and NT Health for drug and alcohol rehabilitation programs.

Intjartnama functions as a healing and respite centre: when people stay at Intjartnama they are given time to rest, then get strong and recover, then work when they get better. Clients on probation are referred for home detention by Correctional Services. They come with their families, to get away from alcohol, and family violence and to learn about themselves and about Aboriginal culture.

A number of young people have also come to stay at Intjartnama, with or without families. Some of these children have been active petrol sniffers. They come to Intjartnama to be taken care of, work and engage in various activities and recover. One 12 year-old-girl came of her own accord. She had been subject to abuse from her family and came to Intjartnama to feel safe. At Intjartnama young people are taught traditional stories and how to cook, clean, work, hunt and track, as well as how to act in court.

Intjartnama are currently discussing the possibility of becoming a venue for young offender conferences with the Juvenile Diversion Unit of NT Police.

n ***Anglicare 'Bridging the Gap' program (Angurugu, Groote Eylandt)***

The Bridging the Gap Program is run by Anglicare workers with oversight by a senior culture man from the western side of Groote Eylandt and Bickerton Island. The program, accredited with the police and NT Correctional Services, requires young people to work for a period of time at the aged and disability respite centre at Angurugu which was established by Angurugu Community Council and is run by Anglicare. Two young people, a boy and girl, have been referred to the program so far. The young people have helped record older people's stories, as well as providing practical help around the centre. The aim is for young people to get in touch with older people in their community and learn about their roots, as well as to encourage responsibility. The older people's self-esteem is also supported by the program. As at August 2001, the only other program listed in police reports for police diversion on Groote Eylandt is a program aimed at integrating juvenile offenders back into educational programs at the Angurugu School.

Post-court diversionary options for juveniles in the NT

Post-court, or at-court, diversion was introduced in the NT in 1999 under section 53AE of the *Juvenile Justice Act 1993* (NT) to temper the effects of mandatory sentencing legislation on young people. The scheme was accordingly only

56 Barry and Elva Cook and family with Craig San Roque, *Story about Intjartnama – A Healing Place – An account of work in progress at Intjartnama Outstation*, April 1994.



available in limited circumstances to defendants aged 15 – 17 years facing their second property offence⁵⁷ and on one occasion only.⁵⁸

Under the system, a second time property offender could be ordered to participate in a program approved by the Minister for post-court diversion,⁵⁹ including victim/offender conferences, community works programs, cultural/traditional programs, sporting skills development programs, vocation training programs, counselling programs or life-skill programs.⁶⁰

Victim/offender conferences usually involve a NT Corrections facilitator, a police superintendent, the victim, the young person and support people. The participants discuss the offence and its impact and then develop an outcome plan, by consensus, of actions the young person will take to make up for the harm to the victim and community. Compliance with the plan is monitored by the Program Coordinator.

Victims have been willing to attend victim/offender conferences in some Indigenous communities but have been less accommodating in others. In addition, there has been initial resistance to diversion among some police officers, although this may have decreased. Young people have been assessed as suitable for diversion despite multiple previous charges or already being on good behaviour bonds. Sometimes young people have been assessed as unsuitable for pre-court diversion by police but have then been diverted through the post-court process.

Apart from victim/offender conferences, all the approved programs for diversion already existed. They now receive funding from Correctional Services on an individual offender basis to operate as diversionary programs. During consultations in the Northern Territory, many community groups expressed doubts about the appropriateness of some of the accredited programs for traditional Aboriginal young people.

NT case study

Two young people were arrested in relation to a break in at the Council office in an Aboriginal community. During the break in, the Council's computers were severely damaged.

The young people admitted their role to the Aboriginal community and were immediately sent on a four week bush camp with an uncle to learn traditional hunting and tracking skills.

When the victim/offender conference was held, the young people had already been on the camp. The conference acknowledged this intervention and adopted it as the outcome plan. The young people were also offered voluntary participation in a course. The Court endorsed the outcome plan.

57 *Juvenile Justice Act 1983* (NT) s53AE(2)(c). For all other offenders the Court has been able to order a variety of dispositions besides detention under s53 (1).

58 *Juvenile Justice Act 1983* (NT) s53AE(6).

59 A list of these programs approved as at June 2001 can be obtained from NT Corrections. They include programs in Darwin, Daly River/Port Keats region, Katherine region, Tennant Creek region, Alice Springs region. Not surprisingly, considering the size of NT communities, these programs also function as programs for referral for pre-court diversion.

60 Pamphlet on Detention Diversion Programs produced by the Program Coordinator, NT Correctional Services.



During the period 1 August 1999 to 30 June 2000, a total of 41 referrals were made by the Court to NT Corrections for post-court diversion. Indigenous young people comprised 85 per cent of these referrals. More recently in the period between 1 July 2000 and 31 July 2001, 14 juveniles have been referred by the Court for diversion, some 43 per cent Aboriginal young people.⁶¹

The following preliminary observations can be made about the statistics provided.

- All young people diverted at this stage were facing mandatory minimum terms of detention as second property offenders;
- Aboriginal young people were initially a very high proportion of this group but their representation has declined in the past year; and
- It is not clear from information provided by NT Corrections so far, what percentage of suitable and successful referrals were Aboriginal young people.

One of the concerning aspects of the diversion provisions for second time property offenders was the possibility of double punishment. If the court were satisfied that the young person had satisfactorily completed the diversionary program, it could discharge the defendant without penalty or impose any of the penalties generally available to the court including fines, good behaviour bonds, community service orders, punitive work orders,⁶² probation, detention, imprisonment, participation in an approved program or any adult sentencing option.⁶³ This meant that a young person who committed a specified property offence could be sentenced to custody even after completing a diversionary program as directed. At June 2001, young people had received dismissals, conditional bonds, community service orders and short suspended sentences after successfully completing a diversion program.

On 22 October 2001 the new NT government repealed mandatory sentencing provisions for juveniles, including provisions restricting post-court diversion to mandatory property offenders. Post-court diversion from custody is now available for all offenders aged 10 -17 years.⁶⁴ This is a welcome expansion of the diversionary system which acknowledges that diversion should be an option available to all young offenders, not only those affected by mandatory sentencing provisions. However, it appears that the amendments maintain the possibility of double punishment for young offenders who are diverted to a program approved by the Minister and who satisfactorily complete the program.⁶⁵

61 This total includes one request by a court for a victim/offender conference as a condition of a good behaviour bond.

62 Punitive work orders were introduced at the same time as mandatory sentencing: Pt VI, Div 3A. Unlike community service orders, punitive work orders were compulsory and did not require the consent of the offender. Young people performing punitive work orders could be required to wear identifying equipment or clothing while performing the work by the supervisor: *Juvenile Justice (Punitive Work Orders) Regulations 1998* (NT) cl.14(1). However, the amendments to the *Juvenile Justice Act* which came into operation on 22 October 2001 have since repealed punitive work orders altogether and renamed community service orders as community work orders; 'A Bill for an Act to amend the *Juvenile Justice Act*', prepared by the Office of Parliamentary Counsel, NT, 13 October 2001.

63 *Juvenile Justice Act 1983* (NT) s53AE(4).

64 *Juvenile Justice Act 1983* (NT), s53 (1)(ea), 11 and 12.

65 Amendments to the *Juvenile Justice Act 1983* (NT), s53(12).



Since the amendments in October 2001 there have been few referrals made to Correctional Services for conferencing or other program diversion. It has been suggested to us that in practice magistrates are reluctant to order diversion to approved programs under the new amendments as it means adjournment before sentence. Instead, Supervised Good Behaviour Bonds are being applied with a condition that the offender participates in the program. These are inappropriate when the juvenile has little or no support in the community.

Operation of the NT pre-court diversionary scheme

The following statistics show the operation of the pre-court diversionary scheme for the period 1 September 2000 to 30 June 2001. The statistics were provided by the Northern Territory Police Force in response to a written request by the Commission.⁶⁶

Table 1 Total juvenile apprehensions and diversions, 1 Sep 2000 – 30 June 2001

	Number	Percentage ⁶⁷
Total juvenile apprehensions in NT⁶⁸	1394	N/A
Apprehensions for minor property offences only	265 ⁶⁹	
Ineligible for diversion ⁷⁰	53	4%
Eligible for diversion	1341	96%
Diversion not offered	216	15%
Diversion offered	1125	81%
Diversion declined by parent/juvenile	23	1.6%
Diversion unsuccessful	13	0.9%
Total number successfully diverted	1089	78%

Table 1 shows the extent to which diversion has been utilised in the first 9 months of the scheme. Of the 96 per cent of apprehensions eligible for diversion, it was offered 81 per cent of the time. Young people were successfully diverted in 78 per cent of apprehensions. It is not yet possible to say how many young people this affected (as one young person may have more than one apprehension in the statistics). It is also not clear whether the new diversionary

66 Twelve month statistics for the scheme were not available at the time of finalisation of this report, due to the conduct of the inter-governmental review of the scheme's first year that was required under the agreement with the Commonwealth. The Commission has been assisted by the cooperation and openness of the NT Police during the conduct of this research. According to the Juvenile Diversion Unit, all statistics contained in tables are 'indicative' only.

67 This is the percentage of total apprehension cases unless otherwise stated.

68 An apprehension case may include multiple charges and multiple apprehensions.

69 Police are required to offer diversion to these offenders.

70 See Police Commissioner's General Order J1 – Juvenile Pre-court Diversion, Sch A for excluded offences.



regime has formalised police interventions, such as informal cautions, that would previously have gone unrecorded.⁷¹

Of the 265 apprehensions for Minor Property Offences, all of which were referred for diversion, conditions (such as an apology or restitution) were attached / created by the diversion in the case of 201 apprehensions.

Table 2 Apprehensions and diversions of Indigenous young people, by gender, 1 Sep 2000 – 30 June 2001

	Number	Percentage
Total apprehensions	783	56% ⁷²
Serious or excluded offences	691	88%
Minor offences	91	12%
Total offered diversion	622	79%
Diversion not offered (includes excluded offences)	161	21%
Indigenous young women offered diversion	158	25% ⁷⁴
Aged 10-14 years	87	
Aged 15-17 years	71	
Indigenous young men offered diversion	464	75%
Aged 10-14 years	246	
Aged 15-17 years	218	

71 This concern has been raised about cautions generally by Blagg, H and Wilkie, M, *op.cit*, p55. According to NT Police, Fire and Emergency Services, *1999-2000 Annual Report*, Table 10, p96, apprehensions of juveniles in the NT increased slightly between 1995/96 (1283) and 1999/00 (1571). The NT Police, Fire and Emergency Services, *2000-2001 Annual Report*, p41, states that that the total number of juveniles apprehended in 1999/2000 was 1960, which dropped to 790 in 2000/2001. This appears to indicate that juvenile diversion has decreased police contact. However, it is unclear whether the two sets of figures for 1999/2000 given above refer to apprehensions or distinct persons.

72 This percentage is of the total juvenile apprehensions.

73 This percentage, and the one below, is of the total of Indigenous apprehensions. Indigenous young people account for approximately 60 per cent of the total number of apprehensions not eligible for (53) or denied diversion (269). Exact numbers of Indigenous young people for each of these separate categories was not available for this period. However, information from the 6 monthly performance report by the NT Government to the Commonwealth on diversion programs and the Aboriginal Interpreter Service, from 1 September 2000 to 31 March 2001 indicates that of 38 juveniles excluded from diversion over that period, 63.2 per cent were Indigenous. Indigenous juveniles comprised 58.1 per cent of the serious cases (where police discretion is exercised).

74 This percentage, and the one below, is of the total number of Aboriginal young people offered diversion.



Aboriginal people make up 28.5 per cent of the Northern Territory population,⁷⁵ and approximately 36 per cent of people under 18.⁷⁶ Table 2 shows that 56 per cent of all juvenile apprehensions in the period involved Aboriginal young people. Aboriginal young people are still clearly over-represented at this point.

However, Table 2 also shows that in the first 9 months of operation, Aboriginal young people are getting the benefit of diversion at a rate (79 per cent) close to non-Aboriginal young people (81 per cent). Aboriginal juveniles are denied diversion at slightly higher rates than non-Indigenous juveniles.⁷⁷

Table 3 Diversion by type, 1 Sep 2000 – 30 June 2001

	Number	Percentage
Total Diversions	1102⁷⁸	N/A
Verbal warnings	487	44%
Written warnings	295	27%
Formal caution/Family conferencing	261	24%
Victim offender conference	59	5%

Table 3 shows that the vast majority of diversions have been by way of verbal and written warnings (which together amount to 71 per cent of diversions) and formal cautions (a further 24 per cent).⁷⁹

According to the Police Juvenile Diversion Unit information supplied to the Commission, all cautions/family conferences and victim offender conferences (totalling 320) involve agreement to a 'personal program' which may include anything from an apology to a victim to participation in either a registered or non-registered program. Registered programs have been discussed above. Non-registered or 'informal programs' may involve the referral of the offender to a one-off project such as work for the victim or after school activities.

⁷⁵ See www.abs.gov.au, 17 August 2001.

⁷⁶ *Seen and heard, op.cit.*, para 2.11.

⁷⁷ It is unclear whether this is because Indigenous young people are apprehended for more serious and excluded offences than non-Indigenous young people or because of any other factor affecting offers of diversion.

⁷⁸ This is the total number of the total of those young people who consented to and participated in diversion. The information provided so far does not indicate the unsuccessful diversions for each of the totals below.

⁷⁹ These percentages are based on a percentage of the 1102 diversions that were consented to by young people.

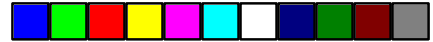


Table 4 Referrals to Programs, 1 Sep 2000 – 30 June 2001

	Number
Referrals to Programs	67
Registered Programs ⁸⁰	29 (14 ATSI) ⁸¹
Informal Programs	38 (34 ATSI) ⁸²
Registered Programs – Completed	23
Registered Programs – Not completed	3
Registered Programs – Unsuccessful (referred to Court)	3
Informal Programs – Completed	27
Informal Programs – Not completed	6
Informal Programs – Unsuccessful (referred to Court)	5

Table 4 indicates that there have been relatively few referrals to either registered or non-registered programs. Further, the majority of referrals are for non-registered programs.⁸³ Indigenous young people comprise 48 per cent of referrals to registered programs and as much as 89 per cent of referrals to 'informal programs'. This may be an indication of a lack of formal programs in regional and remote areas of the NT. Of registered program referrals, more than 75 per cent are situated in the three major towns in the NT – Darwin, Alice Springs and Katherine. Only one of the 67 referrals to either registered or non-registered programs was for a substance abuse program.⁸⁴

Table 5 provides a regional breakdown of when diversion has been offered and the type of diversion used. It shows that in a number of the larger centres, such as Alice Springs, Casuarina, Darwin City, Katherine and Tennant Creek, the percentage of young people denied access to diversion was fairly high. In other regions, such as Palmerston, the rate of young people denied diversion was low or non-existent, as in the case of Elliott and Lajamanu. In many areas verbal and written warnings made up a large percentage of the total diversions.

80 These include training programs, substance abuse programs, counselling and, community and adventure programs.
 81 Of the 14 Indigenous young people on registered programs, 2 were young women aged 10-14, 5 were young men aged 10-14 and 7 were young men aged 15-17.
 82 Of the 34 Indigenous young people on informal programs, 2 were young women aged 10-14, 13 were young men aged 10-14 and 19 were young men aged 15-17.
 83 The Juvenile Diversion Unit points out that these 'can be more onerous and achieve better results than a registered program'.
 84 This referral was for a non-Indigenous male.

Table 5 Diversion by type and location, 1 Sep 2000 – 30 June 2001

Place ⁸⁵	Diversion denied	Diversion denied	Verbal Warning	Written Warning	Formal Caution	Conference	Total
Alice Springs	68	7	106	66	31	6	284
Casuarina	82	8	157	112	60	17	436
Darwin City	28	3	17	13	6	3	70
Elliott ⁸⁶	–	1	8	–	10	3	22
Katherine	30	–	26	17	26	2	101
Lajamanu ⁸⁷	–	–	1	2	20	4	27
Ngukurr ⁸⁸	6	–	4	10	13	–	33
Nhulunbuy ⁸⁹	1	–	6	10	15	3	35
Palmerston	15	2	107	41	27	7	199
Tennant Creek	15	–	33	11	8	4	71
TOTAL	245	21	465	282	216	49	1394

Statistics for the period 1 September 2000 to 30 June 2001 also indicate that 212 victim/offender conferences facilitators have been trained, including 179 police. A total of 430 police have been trained in juvenile diversion. Inclusive of conference facilitator training, 46 per cent of police in the NT have now been trained. 33 Aboriginal Community Police Officers (ACPOs) have been trained in juvenile diversion. Three ACPOs have been trained in conference facilitation.⁹⁰ All recruits get a full day of training in diversion.

Four police civilian staff and 33 non-police have also been trained to facilitate conferences. There are no figures to indicate who is used in practice, but considering the small numbers of conferences which have taken place, it is presumed that many of the facilitators have not had an opportunity to participate.

Diversion in the NT assessed against best practice principles

The introduction of the NT Pre-Court Juvenile Diversion Scheme is a positive development in the NT. The first twelve months have seen rapid progress in the unveiling of the scheme. However, there have been a range of concerns that have come to the Commission's attention during consultations about the new

85 These locations were included because over 20 diversions had been considered. A number of locations previously considered to be juvenile crime trouble spots had relatively low figures, for example Yuendumu (14).

86 Elliott is on the Stuart Highway between Daly Waters and Tennant Creek. Of the 22 young people diverted, 1 participated in an informal program.

87 Lajamanu is near the western border of the NT, on the edge of the Tanami Desert. Of the 27 young people diverted, 8 participated in an informal program.

88 Ngukurr is on the south-west tip of Arnhem Land near the Gulf of Carpentaria. Of the 33 young people diverted, 1 participated in an informal program.

89 Nhulunbuy is in the far north-east of Arnhem Land on the Gove Peninsula. Of the 35 young people diverted, 8 participated in informal programs and 1 in a registered program.

90 Performance Information, 6 monthly report to the Commonwealth on diversion programs and the Aboriginal Interpreter Service, All Diversion Training Summary (12).



scheme. Some concerns with the detail of the scheme have already been mentioned, and some of these may relate to the scheme's relative newness. However, further concerns are more fundamentally to do with the conception of the model itself and its application to the cultural and socio-economic factors affecting Indigenous people in the NT.

Earlier in this chapter I set out best practice human rights principles for juvenile diversion. This section assesses the NT scheme against these standards.

1) *Viable alternatives to detention*

Human rights principles require that a range of community-based diversionary options be available, adequately resourced and planned and implemented through adequate consultation. The NT scheme does not perform well on these criteria.

In its initial stages, the majority of diversions under the scheme have been at the lower end of the scale, with cautions and warnings rather than referral to programs. There are limited community based alternatives at this stage, due in part to the poor level of infrastructure and service networks in many communities. To date, funding for programs has been on a fee-for-service basis and has not been utilised to establish schemes. At the same time, the creation of such schemes would not be viable in many communities if their primary purpose was to serve as a diversionary option.

Consultations revealed concern over program gaps in many under-resourced areas. For example, there is a pressing need for petrol sniffing rehabilitation programs in many remote communities.⁹¹ Warnings and cautions may be given out liberally to young people in some remote communities but if the root cause of offending is petrol sniffing, and at the base of this, poverty and family violence, then these offending patterns will not be solved in the long term by these mechanisms. Because the diversion money is paid on a fee for service basis, community organisations who are seeking funding for the establishment of petrol sniffing and other programs are unable to access the funding from NT police, as it is unable to provide resourcing to establish or maintain such projects. The Central Australian Youth Justice Coalition (CAYJ) has suggested that a steering committee be established to identify pilot programs for the diversion rather than the money being ineffective because it is spread too thinly.⁹² Other community groups and legal services suggest that there should be a proper assessment of existing programs that could be funded and identification of the gaps.

This problem highlights the fact that meaningful diversion is impossible without a whole-of-government commitment to providing resources and basic welfare

91 The Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council has continually identified a pressing need to address petrol sniffing problems in the lands which they cover in the NT and SA. NPY been running a petrol sniffing project in Fregon, South Australia since 1999, which was broadened and renamed the Young People's Program in 2001. They are also planning other youth projects to address petrol sniffing. Issues of funding and ongoing commitment across community and government remain key hurdles to the implementation and success of these programs.

92 CAYJ, *Position Paper: Prevention is better than detention*, 12 July 2000.



infrastructure in remote communities, in partnership with these small communities to meet their specific needs.

As mentioned above, the NT Police Force has now decided to put resources towards establishing community youth development units in key regional areas to seek to provide a more holistic approach to coordinating service delivery and programs in communities. This is an ambitious approach which has potential to alleviate these serious concerns. There are, however, two main concerns with this approach. First, it requires commitments and resourcing from other government agencies at the territory and federal level to succeed – it cannot be left to the level of resourcing provided to NT police to implement effectively. Second, it is highly questionable why NT Police should be the coordinating agency for such an approach. It must also ensure adequate involvement of representative Indigenous organisations, especially ATSIC to provide an interface with other government departments and for the allocation of specific (though not substitute) funding where appropriate.

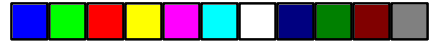
The lack of community resources in communities is compounded by the failure of some government programs. For example, some legal practitioners, government officials and social workers spoke of the inadequate care and protection system in the Northern Territory. The *Community Welfare Act 1983* (NT) establishes child protection teams and provides a system for the welfare of children who are declared to be in need of care. However, there is limited support for crisis accommodation. This is illustrated by the fact that NT Corrections finds accommodation for children without family support when on bail rather than the Family and Community Services (FACS) unit of NT Health.

Indigenous communities were also not adequately consulted about the model of pre-court diversion adopted in the Northern Territory although the Police Service has begun consultations with communities about what types of programs should be accredited for referral.⁹³ Communities are complex and often divided. The Commission considers it essential that they control the process by which program gaps are identified and new crime prevention and diversionary options are established.

There is some flexibility in the system to include Indigenous community members in the implementation of diversionary options. For example, the Police General Orders specify that programs will take into account any appropriate cultural, religious and community requirements. Formal cautions can be carried out by a respected person in the juvenile's community such as an Aboriginal leader.⁹⁴

93 A report prepared by the NT Juvenile Diversion Division of the NT Police, 'A diverse approach to juvenile offending in the Northern Territory', 20 June 2001 states that in excess of 170 agencies, organisations, service providers and community councils have been consulted or briefed on community program development. In addition more than 700 community members have been briefed on the Diversion scheme by personal presentations and meetings by the JDU. Certainly, a number of organisations we spoke to in Alice Springs, Darwin, Tennant Creek and Groote Eylandt had some contact with the Juvenile Diversion Unit, although this was after the scheme had been established.

94 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001, paras 2.7, 6.4.2.



Police Guidelines on warnings, cautions and victim/offender conferences specify that it is essential in rural communities to 'involve' the community in the process.⁹⁵

There is willingness on the part of the Juvenile Diversion Unit to work in partnership with Indigenous communities. However, there has been no systematic approach to encourage Indigenous people's participation in the diversionary process, from planning through to participating in conferences, and this has led to some disquiet among Indigenous people. There is no overarching requirement in legislation to ensure cultural appropriateness at all stages of the process. Unlike in New Zealand, for example, there is no legislative requirement that diversion options foster the ability of Indigenous family groups to develop their own means of dealing with offending by their children.⁹⁶

2) Availability of diversion at all stages of the criminal justice process

The scheme performs well on this criteria. A wide variety of forms of diversion are available at the pre-court and post-court stages. It is also available for a wide variety of offences, rather than being constrained to property offences that previously attracted mandatory terms of imprisonment. There are some restrictions on the availability of diversion – for a range of excluded, more serious offences, and through the narrow definition of 'minor' offences to be dealt with at the lower level of diversion. The scheme does not preclude future diversion where a juvenile has previously participated in a diversionary program.

It is too early to establish whether a pattern exists of breaching conditions resulting in custodial measures (though the police general order does envisage that young people who do not comply with conditions will be referred for prosecution). This issue should be monitored closely.

3) Discretion exercised on the basis of established criteria prescribed by law

Post-court diversionary options are specified in the *Juvenile Justice Act 1993* (NT). However, the legislation setting up the pre-court diversion scheme is extremely bare, leaving most matters to Police standing orders. This means there has been limited parliamentary scrutiny of the way diversion operates in practice. It also means that the scheme is subject to reform at the will of the Northern Territory Police Force. This approach is consistent with the philosophy behind the Wagga model of diversion and is not unique to the NT. It enables flexibility for the scheme to adapt as it develops, but it also raises concerns about the lack of transparency of the scheme.

A major concern that the Commission has with the pre-court scheme is the extent of discretion vested in the police. Under the NT model, police have been given exclusive control of the scheme's operation. In addition to the normal discretion they have to decide whether to lay charges and which charges, the police also determine whether a juvenile should be offered diversion, administer warnings and cautions, facilitate victim/offender and family conferences and are required to authorise programs for referral.

95 NT Police, *op.cit.*, April 2001.

96 *Children, Young Persons, and Their Families Act 1989* (NZ), s208.



'Front end' diversionary mechanisms, which are based at the point of first contact between offenders and the criminal justice process, exist in some form in most societies based upon the common law tradition. This tradition gives considerable scope for discretionary decision-making at the lower level of the system. There are strengths and weaknesses in this. One strong point is that cases can be dealt with relatively speedily without recourse to formal processes. A weakness is that police practice is notoriously opaque and difficult to scrutinise. This lack of transparency has attracted concerns that police discretion is not always used appropriately with some groups of young people.

Seen and heard, the report of the national inquiry into children and the legal process, heard evidence about the discriminatory impact of the legal process on Indigenous youth, and was particularly concerned about lack of controls over police use of discretionary powers.⁹⁷ The report commented that diversionary programs in Australia failed to take adequate account of the particular needs of Indigenous youth and argued that, 'the level of police involvement in most conferencing models is particularly problematic for Indigenous youth'.⁹⁸

These concerns have particularly been expressed at the development of 'police led conferences' in Australia such as the Wagga model in NSW, which was seen as concentrating too much power in the hands of one particular group and as impacting negatively on vulnerable and marginal groups of young people, such as Indigenous people.⁹⁹

Similar observations were made in the *Bringing them home* report. The historical role played by the police in the removal of children and the implementation of discriminatory government policies still has consequences in terms of poor Aboriginal/police relations. The report argues that police involvement in conferencing:

has particular significance for Indigenous communities given the history of removals and prior police intervention (and)... increases the reluctance of Indigenous people to attend meetings and contributes to a non-communicative atmosphere for those Aboriginal youth who attend.¹⁰⁰

The police 'gate-keeping' role is of pivotal importance in framing how the justice system as a whole deals with individual cases. Decisions the police make can have serious consequences down the track. The police have discretion in determining, for example, whether to deal formally or informally with cases and, if they decide to proceed formally, they will select the kinds of charges offenders will face. In turn, this may influence the form any ensuing judicial proceedings will take, as 'the choice of charge, determines the mode of trial'.¹⁰¹ For this

97 *Seen and heard, op.cit*, pp485-487.

98 *ibid*, p485.

99 Blagg, H and Wilkie, M, *op.cit*; Sandor, D, 'The thickening blue wedge in juvenile justice' in Alder, C and Wundersitz, J (eds), *Family conferencing and juvenile justice: The way forward or misplaced optimism*, Canberra, The Australian Institute of Criminology, 1994; Bargin, J, 'Kids, cops, courts, conferencing and children's rights', (1996), 2, *Australian Journal of Human Rights*, pp209-215; H Blagg, 'A just measure of shame? Aboriginal youth and conferencing in Australia', (1997), 37(4), *British Journal of Criminology*.

100 *Bringing them home, op.cit*, p525.

101 Ashworth, A, *The criminal process*, Oxford, Oxford University Press, 1994, p7.



reason, it has been argued that the policing process needs to 'be at least as rigorously constrained with a framework of rights as the court or trial process'.¹⁰²

During consultations for this research, the Commission heard that the level of control by the police is problematic because of persistently poor relations between the NT police force and Indigenous communities. On Groote Eylandt, for example, Indigenous people in the Aboriginal township of Angurugu told the Commission that their main interaction with the police is when the police come into Angurugu the day before the circuit court commences in order to execute warrants of arrest and remove accused offenders to the police lockup in Alyangula. It is a relationship largely based on the removal of, predominately, younger male members of the community.

Criminologist Chris Cunneen has written extensively on the relationship between Aboriginal peoples and non-Aboriginal law enforcement agencies. As Cunneen points out, reliance on police discretion may not appear so damaging in theory, but seen in the context of colonisation and dispossession it can be counterproductive:

Where police authority is founded on community endorsement and community respect, then police discretionary decisions are likely to be seen as a legitimate practice in the equitable operation of the law, but this is precisely what is missing in the relationship between Indigenous communities and police. The police function has a particular resonance for Indigenous communities, given the history of intervention already outlined.¹⁰³

The relationship between police and young people generally also seems particularly fraught.¹⁰⁴ This is understandable given the raft of laws introduced and vigorously enforced in the NT in recent years such as mandatory detention laws, zero tolerance policing and over-regulation of public spaces.

During focus groups which the Commission conducted with Aboriginal young people in Alice Springs, participants spoke of constant contact with police at the latter's initiation. A common complaint was police picking up young people after 10 pm at night and taking them home when they are not alleged to have committed any offence.¹⁰⁵ The young people felt police showed disrespect for them by swearing and 'talking rough': 'It's not nice to be treated like that.' This is confirmed by other studies:

102 Blagg, H and Wilkie, M, 'Young people and policing in Australia: the relevance of the UN Convention on the Rights of the Child' (July 1997), 3(2), *Australian Journal of Human Rights*, p144.

103 Cunneen, C, *Conflict, Politics and Crime*, op.cit, p142.

104 This problem is not limited to the Northern Territory. See, for example, *Seen and heard*, op.cit, paras 18.63-72.

105 It has been common practice in Alice Springs for juveniles to be detained and transported to the Police Watchhouse to obtain sufficient details in order to decide who to contact and what to do with them. On 28 March 1999 a 16 year old Aboriginal boy was taken into protective custody by the police and later died from hanging in a cell at Alice Springs Police Station Watchhouse. HREOC provided a submission to the Inquest of his death, asserting that there was a breach of Australia's human rights obligations, especially articles 3,4,6,19,27 and 37 of CROC.



There wouldn't be one Aboriginal young person who comes to this service that hasn't had a negative experience with police. It is just part of their lives in Alice Springs. They have a bike, for example. The police stop them. 'Where'd you get that bike?' It is just assumed that they steal, that they have nothing and that they're entitled to nothing.¹⁰⁶

The young people in the focus groups stated that police sometimes did not help them when they were in trouble, for example, when being assaulted in the street. Their negative comments were usually directed at specific police officers. They had a more positive impression of Aboriginal police.

The history of poor relations between police and Indigenous communities was acknowledged by various police officers during our consultations, although they did not tend to identify current policing patterns as having contributed to this situation. This acknowledgement has certainly operated as a motivating factor for many police – they see the diversionary process as having great potential to lead to a more positive relationship with Indigenous communities. Indeed, it was suggested to us that one of the prime benefits of the police pre-court diversionary scheme was the potential for a change in police culture. It is possible that as a result of involvement in diversionary programs police in the NT may become more aware of the need for more effective and less punitive approaches to juvenile justice for Indigenous people. However, police control of the process is not essential to this aim, and may indeed be counterproductive if not properly resourced and monitored.

Police control of the process is especially problematic when there is a lack of involvement by other agencies and organisations, limited safeguards of rights and no independent monitoring (as discussed further below), and is exercised without a clear legislative framework.

4) Training of law enforcement officials involved in the administration of diversion to meet the needs of young people

The statistics on the operation of the diversionary scheme in the first nine months indicates that there has been extensive formal training of police in diversion. The Police Training Manual is also currently being updated to provide the appropriate emphasis on diversionary processes. It is too early to say how adequate this training is, or how NT Police will be ensuring that training and skills development regarding diversionary processes is ongoing.

Formalised training for police, however, does not of itself meet the requirement to ensure that all officials involved in the administration of juvenile diversion are specifically trained and instructed to meet the needs of young people. As some police stated to us during consultations, they are not specialist youth workers. Training in diversion, while highly significant, does not equip the police to deal with the full range of issues and circumstances facing young people – particularly in coordinating their service needs such as crisis accommodation, welfare and health support. Training of police does not obviate the need for specialist youth case workers.

¹⁰⁶ Astri Baker, youth worker at the Alice Springs Youth Accommodation Support Service in Johnson, D & Zdenkowski, G, *op.cit*, p125.



There are, however, no specialised government services which meet the needs of juveniles in the NT. There is no department of juvenile justice. Instead, NT Correctional Services administer juvenile justice centres in the Northern Territory¹⁰⁷ as well as the Juvenile Offender Placement Program (JOPP) as an alternative to a bail hostel.¹⁰⁸ Young people released on supervised orders must report to probation officers from Correctional Services. Within NT Corrections, there is no juvenile division or any specific funding for juvenile programs. Its main role is supervision through appointments and the co-ordination of local services. As noted earlier, there is also limited support provided by the FACs Unit of NT Health.

This can be compared to other jurisdictions in Australia, where supervising departments offer specialist counselling and specific programs. For example, the NSW Department of Juvenile Justice provides drug and alcohol counselling, a violent offenders program and a sex offenders program to those in custody and on supervised orders in the community.

The lack of specialised youth services in the NT government is a serious impediment to the effective implementation of diversionary approaches in the NT. The recent re-shuffling of government agencies and departments in the NT, with NT Corrections joining the Attorney-General's portfolio in a new Department of Justice, provides an opportunity for a specialist juvenile division to be created which can combine the coordination of pre and post-court diversionary schemes, and to alleviate these concerns.

5) *Diversion requires the informed consent of the child or his/her parents*

Human rights principles require that young people consent to diversion; are given sufficient information about diversionary options; are able to express their views during the diversionary process; and are not coerced or intimidated at any stage of the process. There are a range of concerns about how the current process meets these requirements.

Neither the *Police Administration Act 1978* (NT) nor the Police Commissioner's General Order require young people to be given access to legal advice prior to consenting to diversion or during a victim/offender conference. This is in contrast to other jurisdictions and seriously undermines the ability of young people to give informed consent to diversion.¹⁰⁹ There is also no children's legal service that can assist juvenile offenders, nor is there a juvenile justice agency which can operate as specialist assistance for young people. Proposals to establish a Children's Legal Service in the NT are welcomed government funding of such an initiative is highly recommended.

107 NT Correctional Services has recently been amalgamated into the new Department of Justice, which includes the Attorney-General's Department, Court Administration, Public Prosecutions, Anti-Discrimination Commissioner, Office of Consumer Affairs and the newly created Office of Crime Prevention. A Juvenile Division has not been created.

108 Family placements of around 28 days duration are found for young people who are homeless or cannot return to the family home.

109 See, eg, *Young Offenders Act 1997* (NSW) ss 22(1)(b), 39(1)(b); *Young Offenders Act 1993* (SA) ss11(2), (5); *Juvenile Justice Act 1992* (Qld) s 18D; *Youth Justice Act 1997* (Tas) ss9(1), (2).



Practitioners in Alice Springs and Darwin have reported that young people are sometimes not offered diversion under the scheme until after they have been charged.¹¹⁰ If they consent to diversion and are assessed as suitable, the charge is then withdrawn at Court. This contains an element of coercion to consent to participation in diversion that is unacceptable.

A further element that can contribute to coercion to participate in diversion is the absence of a requirement that a young person pleads guilty before being offered diversion.

The potential for coercion in this regard was compounded when diversion was required to operate alongside mandatory detention laws. Some lawyers have stated that there have been occasions where they have had to advise a client who had protested their innocence that they could either go to court and risk mandatory imprisonment if they lose, or participate in a diversionary option and avoid court.

It is unknown what information is given to young people by police to ensure that they make an informed choice as to whether to participate in diversion. It is also unknown whether interpretation is used in explaining diversionary options. These factors need to be monitored to ensure that they do not contribute to coercive outcomes.

6) *Young people are provided with procedural safeguards throughout the diversionary process*

Problems of access to legal representation prior to being offered a diversionary option was discussed above. There are other deficiencies in the provision of procedural safeguards in the NT pre-court diversionary scheme which relate to the presumption of innocence, right to silence, confidentiality and the right to privacy.

The presumption of innocence or right to silence do not appear to be safeguarded by the current system. The fact that formal admissions are not required and access to legal advice is extremely limited means there is a risk young people are consenting to diversion so they can be removed from an oppressive situation as quickly as possible. Indigenous children may admit to offences they have not committed in order to avoid the possibility of a period in detention. Anecdotal evidence from the North Australia Aboriginal Legal Aid Service (NAALAS) suggests that some young people have been pressured to give a record of interview in return for diversion.

During the parliamentary debate on the 2000 amendments to the *Police Administration Act 1978* (NT), the Deputy Leader of the Opposition proposed an amendment so that diversionary options would only be available after a finding of guilt by a court. This proposal reflected concerns that the presumption of innocence was in jeopardy:

¹¹⁰ In one case in July 2001, a NAALAS lawyer argued at court that his 15 year old client should have been diverted by the police before reaching court. After directing the lawyer to leave the courtroom for raising this issue, the magistrate adjourned the matter for the original reasons raised by the lawyer. Justice Action media release, 12 July 2001, www.justiceaction.org.au.



There will undoubtedly be instances of where it looks bad for the young person, but they did not commit the offence. In some cases such as that, the juvenile will not know the law or their rights, and their parents won't know the law or their rights, or know there is an option of going to court to defend the charge. In such cases the juvenile who did not commit the offence could be directed to a diversionary program which would then form part of their record when they were actually innocent.¹¹¹

A further concern is that neither the legislation nor the relevant Police General Order ensure confidentiality of the diversion process. The Act states that information about a diversion can be produced to a court for the purposes of sentence.¹¹² This is standard practice in several other jurisdictions, however, Children's Courts in the NT are open so the personal and identifying information of children is routinely accessible to the general public. Other jurisdictions make it an offence to publish identifying material about child defendants or those involved in diversion programs.¹¹³

One area where there has been dramatic improvement in protecting procedural safeguards is in the provision of interpreter services. The Police General Orders specify that diversion discussions and victim offender conferences should be translated into a juvenile's first language.¹¹⁴ The Police General Orders also specify that police officers should refer to the 'Anunga Guidelines' when dealing with Indigenous juveniles, but this is also not required in the legislation.¹¹⁵

An Aboriginal Interpreter Service has been established within the Office of Aboriginal Development pursuant to the Commonwealth/Northern Territory Agreement. This has improved the availability of interpreting services at court but as services have to be booked in advance, it has been more difficult to ensure interpreters are available as required by those detained at police stations. This situation has improved as the Interpreter Service has expanded. There is a need for continued monitoring of this issue.

7) Young people are provided with human rights safeguards throughout the diversionary process

A number of concerns have already been discussed relating to the discriminatory impact of the exercise of police discretion. A further way that this can be reflected is through what is known as 'net widening'.

111 Stirling, S, *Hansard*, Legislative Assembly (NT), 19 October 2000, <http://notes.nt.gov.au/lant.hansard>.

112 *Police Administration Act 1978* (NT), s120M.

113 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) ss10, 11; *Juvenile Justice Act 1992* (Qld) s62.

114 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001, para 6.14

115 The Anunga Rules were developed in the NT to ensure the use of interpreters and allow accused persons to have an 'interview friend' in attendance during police interviews (*R v Anunga; Rr v Wheeler* (1976) 11 ALR 412). The rules are general guidelines for police conduct, departure from which, according to Justice Forster (1976, 413-4) would 'probably lead to evidence of the interrogation ... being rejected' (cited in Blagg and Wilkie, *op.cit.*, 1995, p130-31).



'Net widening' refers to a process whereby diversionary mechanisms formalise contact with the criminal justice system. The concern is that although issuing of more formal cautions may have reduced contact with the courts, this can be at the expense of formalising a range of contacts with the police. Some studies have shown that police contact has increased for all youth, and even more so for Indigenous youth, since the introduction of cautioning systems.¹¹⁶

Increasing contact with the police is particularly worrying because of the systemic bias against Indigenous young people. Offender profiles of many Indigenous youth are largely built on a string of relatively minor offences, often uncovered through the deliberate targeting of Indigenous youth in public space.¹¹⁷ Findlay, Odgers and Yeo maintain that courts may essentially 'collude' with racially discriminatory practices when they accept at face value 'prior records' of Aboriginal youth that have clearly been assembled as a result of 'over-policing': suggesting that, 'justices are legitimating the police practices of targeting, arresting and charging Aborigines'.¹¹⁸

Other critics have also pointed to a distinct, underlying systemic bias against Indigenous offenders at work within the criminal justice system. Luke and Cunneen, refer to it as a *small but compounding bias*, incremental and accumulative, over time'.¹¹⁹ It begins with the first point of contact with the 'front end' of the system (the police) and builds up steadily at successive stages. Cunneen argues that:

In relation to Indigenous juveniles, police make 'negative' decisions concerning Indigenous young people which, independent of the reasons for apprehension, have the effect of harsher decisions being made at points where discretion is available.¹²⁰

Discretion, Cunneen suggests, is employed 'negatively'. Indigenous youth tend to be cautioned rather than warned, arrested rather than summonsed, and to face 'bulk' charges. The offender profiles of Indigenous youth may be constructed on the basis of over-intervention around trivial incidents early in adolescents. The process can become self-fulfilling. Indigenous youth may be become enmeshed and find it difficult to break out of the cycle.

The statistics in the previous section show that to date Indigenous young people have been offered diversion at an equivalent rate to non-Indigenous young people. It is too early to establish whether discretion is exercised in a non-discriminatory manner though these early signs are encouraging. It is also too early to determine whether there been any net widening effect through an

116 Ferrante, A, *An analysis of police arrest statistics*, Perth, Crime Research Centre, UWA (unpublished).

117 Cunneen, C, *Conflict, Politics and Crime*, op.cit.

118 Findlay, M, Odgers, S and Yeo, S, *Australian criminal justice*, Melbourne, Oxford University Press, 1994, p274.

119 Luke, G. and Cunneen, C, *Aboriginal over-representation and the discretionary powers in the NSW juvenile justice system*. Sydney, Juvenile Justice Advisory Council, 1995, p56.

120 Cunneen, C, *Conflict, Politics and Crime*, op.cit, p31.



increase in the number of apprehensions.¹²¹ This situation must continue to be closely monitored.

8) *There are complaints and review mechanisms relating to the exercise of discretion to divert*

There are very few checks or balances on the discretion exercised by police at all stages of the Northern Territory pre-court diversion scheme. The Police Commissioner's General Order states that officers must have the approval of a senior officer before issuing a summons to a young person to appear in court or proceeding to charge. This provides some scrutiny of informants but is only as effective as the attitude of the senior officer. There is no oversight of the quality of the admission made by the young person or the type of diversion offered by the informant.

No decision made by a police officer during the diversionary process can be reviewed or appealed under the legislation.¹²² In addition, the legislation prohibits civil actions against police officers acting in good faith.¹²³

9) *There exists independent monitoring and evaluation mechanisms for the scheme*

According to human rights principles, the diversionary scheme should provide for independent monitoring of the scheme, including the collection and analysis of statistical data. There should be regular evaluations conducted of the effectiveness of the scheme, and Indigenous people should be included in that evaluation.

Because the scheme was established as an agreement between the Commonwealth and the NT Government, the Commonwealth has required 6 monthly performance reports, an evaluative report after 12 months, and evaluation towards the end of the four year agreement. However, these reports and evaluations cannot be called independent. The 6 monthly reports are statistical summaries provided by the NT Juvenile Diversion Unit. Information for the 12 month report is being coordinated by the Commonwealth Attorney-General's Department, who facilitated the agreement. While both the NT Police and Commonwealth Attorney-General's Department have been cooperative in this project, there have been delays in finalisation of the twelve month review which have meant that it has not been available to the Commission at the time of finalising this report.

121 Police Commissioner's General Order J1 – Juvenile Pre-Court Diversion in force at 15 March 2001, para 6.3.2 provides some deterrent to this occurring. It states that a verbal warning or other diversion is not appropriate if there would have been no reasonable prospect of a conviction.

122 *Police Administration Act 1978* (NT) s120P is effectively a privative clause. It states that decisions about diversion cannot be reviewed under the Act. However, there is no general review provision in the Act which means there is effectively no appeal. Courts have traditionally taken a restrictive view of such provisions.

123 *Police Administration Act 1978* (NT) s120N.



10) *Self-determination of Indigenous peoples*

There has been discussion in the NT about partnerships with Indigenous people in the assessment stage and in providing appropriate settings for conferencing. However, in general Indigenous involvement remains piecemeal and uncoordinated, and police retain primary control over the processes. Increasing Indigenous involvement in established schemes is essential to the effectiveness of the programs.

Self-determination, however, also requires more than offering Indigenous communities involvement in a diversionary system that has already been established along non-Indigenous lines without adequate consultation and partnership. One of the ironies of diversionary schemes in general, particularly conferencing, is that it has tended to 'claim lineage' with the forms of face-to-face dispute resolution practices existing – or which existed – in Indigenous society.¹²⁴ But linkages between conferencing (as currently practiced) and traditional Indigenous Australian dispute resolution practices are more difficult to identify.¹²⁵ Concerns have also been expressed at the 'appropriation' of Indigenous decision making processes through conferencing processes.

An Indigenous community may decide that diversionary schemes run by police or any other government agency are ineffective and undesirable for a range of reasons. Although many Indigenous people in the NT have expressed an interest in accessing diversionary options, others have raised with us a range of other means of dealing with juvenile offenders which could be seen as restorative, such as the incorporation of elements of customary law.

The importance of recognising customary law has been raised a number of times in our consultations in the NT. It has also been the focus of inquiry by the Australian Law Reform Commission¹²⁶ and a current inquiry by the WA Law Reform Commission.¹²⁷ There is no generally accepted definition of customary law – it differs from community to community and evolves over time. The NSW Aboriginal Justice Advisory Council (AJAC) has described it as follows:

Aboriginal customary law is fundamentally a means of dispute resolution based on traditional spiritual beliefs and cultural traditions that provide sanction against those actions which are harmful to the community. In a criminal context fundamentally customary law is simply a means of a community establishing its set of basic values and providing a means to punish those who transgress against its established community laws.¹²⁸

The ALRC Report summarised a number of arguments for and against the recognition of customary law by general law. However, it concluded in favour of

124 Blagg, H, 'Aboriginal youth and restorative justice: Critical notes from the Australian frontier', in Morris, A and Maxwell, G, *ibid*, p227.

125 Daly, K, 'Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects' in Morris, A & Maxwell, G (eds), pp65-66.

126 Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report 31, 1986.

127 The WA Law Reform Commission inquiry into Aboriginal Customary Laws is expected to take several years. For terms of reference see: <http://www.wa.gov.au/lrc/aboriginal.htm>.

128 NSW AJAC, *Strengthening Community Justice – Some issues in the recognition of Aboriginal Customary Law in New South Wales*, Discussion paper, www.lawlink.nsw.gov.au/ajac.nsf/pages/publications, (21 December 2001).



recognition, although not through codification.¹²⁹ The recent NSW Law Reform Commission report into Sentencing Aboriginal Offenders also recommended that:

Where a person, who is, or was at a relevant time, a member of an Aboriginal community, is convicted of an offence, in determining the sentence, the court shall have regard to any evidence concerning the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which the victim was a member at a relevant time.¹³⁰

The issue of recognition of customary law is particularly relevant in the context of juvenile diversion, as successful diversion relies on the support and sanctions of the young person's community. Self-determination means that Indigenous people need to have the primary decision-making role not only in how they may participate in proposed diversionary schemes, but also in deciding which are the most effective and appropriate options for the offenders, the victims, their families and their communities.

The further importance of self-determination relates to the broader picture of marginalisation experienced by Indigenous people.

Diversion is limited in its ability to prevent the overrepresentation of Indigenous people in the formal criminal justice system. Some of these limitations are due to the narrow framework of the legislation, for example diversion is mostly limited to young offenders and minor crimes. There are also operational and resource problems affecting its expansion into remote areas.

The Royal Commission into Aboriginal Deaths in Custody devoted a large part of its report to examining the impact of social and economic disadvantage on Indigenous people. This disadvantage is at the root of Indigenous offending patterns. The criminal justice system is unable to solve these problems alone, although it must certainly work with Indigenous communities and government to ensure the most effective interventions are made.

It is often said that diversion only assists young people who are already in trouble. The 'trouble' often starts at a much earlier age and is the result of poverty, lack of education, family breakdown, violence and substance abuse problems. In a number of cases, Indigenous young people will not re-offend once they have been cautioned once or twice. But it is also the case that if the causes of offending are not dealt with, some children will continue to, and may have no choice other than to, keep offending until they have built up a string of repeat minor offences. It is society's great failure that it is often only then that Indigenous children are offered intensive assistance in the form of protection from violence, drug and alcohol programs, housing, income and support. Indigenous young people need support both before they become offenders and after they have been diverted, not only at the point of diversion.

129 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report 31, 1986.

130 NSW Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96, October 2000, p96.



Recommendations on diversion in the NT

In submitting this report I am required to make any recommendations as to actions that should be taken by governments to improve the recognition of the human rights of Indigenous people.¹³¹ Accordingly, in relation to NT diversionary processes I recommend that:

Recommendation 1: A Juvenile Justice Division be established and adequately resourced within the NT Department of Justice. Prime responsibility for coordinating pre-court and post-court diversion, especially family and victim-offender conferences and referral to programs, be transferred from NT Police and NT Corrections to specialist Youth Case Workers in the Juvenile Justice Division. NT Police retain a Juvenile Diversion Division to implement the continued significant police involvement in diversionary processes.

Recommendation 2: As an urgent priority, a review be undertaken by the Department of Justice to establish program needs across the Territory, particularly as they relate to regional areas and Indigenous people. The terms of the review should include examining methods for coordinating youth service delivery in justice, health and welfare related areas across government departments, including through the NT Police proposal for community youth development units, and the potential for Aboriginal customary law to be recognised through diversionary processes. The review should be conducted on the basis of widespread consultation, particularly with Indigenous organisations.

Recommendation 3: The NT Law Reform Commission be empowered through legislation to conduct an independent review of the operation of pre-court and post-court diversionary schemes every four years. The review be required to consider compliance with human rights standards and to be conducted on the basis of widespread consultation with Indigenous organisations, communities and young offenders.

Recommendation 4: The *Juvenile Justice Act 1993* (NT) and *Police Administration Act 1978* (NT) be amended to provide legislative detail on juvenile diversionary processes. The amendments should require the police to inform the young person that they are entitled to access to a legal advocate or a registered local community advocate (for example, in remote areas) at any stage of the process and to facilitate contact immediately if so required; and should require an admission of guilt prior to a diversionary option, other than a verbal warning, being offered. The amendments should also provide for review of decisions regarding diversion, and independent monitoring and evaluation

131 Section 46C(1)(a), *Human Rights and Equal Opportunity Commission Act 1986* (Cth).



provisions (as outlined above). In relation to Indigenous young people, the legislation should specify that they are entitled to an interpreter as well an interview friend (in accordance with the Anungu rules).

Recommendation 5: A children's legal service be established and appropriately resourced, including through the provision of a 24 hour phone hotline for children's legal advice.

Recommendation 6: It be made an offence to publish material identifying a defendant or a young person who has participated in a diversionary option under the age of 18 years.

Juvenile diversionary options in Western Australia

The level and nature of contact of Indigenous people with the WA criminal justice system has been a matter of great concern for several decades. As noted in chapter 1, Indigenous men are over-represented in custody in WA by a ratio of more than 20 people for every one non-Indigenous male and nearly 30 Indigenous women for every non-Indigenous woman.¹³² This is consistently the highest ratio of Indigenous over-representation in the country. There also continues to be a large number of deaths in custody, both Indigenous and non-Indigenous.

This section examines current diversionary practices in WA and makes suggestions for their improvement. In distinction from the NT, diversionary practices in WA have been in operation in some form or another for around a decade. They emerged in the immediate aftermath of the Royal Commission into Aboriginal Deaths in Custody in the late 1980s and early 1990s. The Royal Commissioners had been especially critical of policing attitudes and practices in Western Australia in regards to Indigenous people, which, they maintained, were perhaps the worst in Australia at that time.

In response to the Royal Commission's findings in 1991, the Lawrence Government established a high level inter-governmental and judicial commission (The State Government Advisory Committee on Young Offenders – SGACYO). The Committee sought to address two seemingly incompatible demands: resolving the problem of Indigenous youth over-representation while, simultaneously, satisfying community demands for a tougher approach to juvenile crime. This is a fundamental contradiction that has had an ongoing impact on the practice of diversion and diversionary conferencing in WA.

Attention was focussed on the high numbers of young people being arrested and placed before the courts. There was concern that these cases were effectively 'swamping' the judicial process with minor cases that could be dealt with more effectively at the 'front end' of the system, meaning at the point of contact with the police.

¹³² Australian Bureau of Statistics, *Corrective services – June Quarter 2001*, ABS Canberra 2001, p21; see also AIC, *Persons in Juvenile Corrective Institutions*, Figure 3, pp16-18.



At the time, the only form of diversion in existence in WA was a 'Children's Panel' for minor offenders run by, and at the discretion of, the police. It was widely accepted that the panel did not fulfil a diversionary function, dealing with trivial matters and offences that may have warranted no more than a warning or 'no action' in other police jurisdictions. At its peak in the early 1980s it diverted about 30 per cent of cases from the system, which fell to around 20 per cent in 1991 as 'get tough' policing became common practice in the wake of moral panics about youth – particularly Indigenous – crime.¹³³

The Panel was abolished in 1991 and trials of police cautioning commenced. This was then formalised under the *Young Offenders Act 1994 (WA)*.¹³⁴ At the time, police were being encouraged to develop alternative 'pathways' out of the system into community based networks of care and control, based on approaches to policing overseas.¹³⁵ The legislation gave wide scope for the exercise of police discretion: the only limitations were placed on what they *could not* divert, as opposed to what they *should* or *must* divert from the system. Hence, a high degree of legislative conservatism was inscribed into the Act from the outset.¹³⁶

A trial of adult conferencing using restorative justice principles has also been conducted by the Department of Juvenile Justice and Murdoch University at Fremantle Court of Petty Sessions. The results will be evaluated late in 2002.

Overview of current juvenile diversionary processes in WA

Diversionary options are established in the *Young Offenders Act 1994 (WA)*. The Act establishes a number of guiding principles including that:

- the system should only be used 'as a last resort';
- young people require 'special provision';
- 'punishment' should be of a kind that would encourage 'social responsibility';
- young people's 'sense of time' be appreciated; and
- the child's age, maturity and cultural background be considered.¹³⁷

133 Daly, K, *op.cit.*, 2001, pp68-9. This shift was captured graphically by an episode in 1991 where a memo by a senior WA police officer encouraging police to 'harass' young people on the street was leaked to Mr Brian Burdekin, the Human Rights Commissioner at the time.

134 *Young Offenders Act 1994 (WA)*, s22A empowers police to 'administer a caution to the young person instead of starting a proceeding for the offence.' Under s22B the police are invited to 'consider whether in all the circumstances it would be more appropriate – (a) to take no action; or (b) administer a caution to the young person'.

135 Kucera, R, *Policing juveniles: an overseas and Western Australian perspective*, Speech, National Conference on Juvenile Justice, Canberra, Australian Institute of Criminology, 1992.

136 *Young Offenders Act 1994 (WA)*, Schedules 1 & 2. These schedules identify certain offences for which a caution cannot be given, for which a juvenile cannot be referred to juvenile justice team and 'for which a conviction will normally be recorded'. There are 70 such exceptions, including offences such as sexual offences, murder and infanticide under the *Criminal Code*, through to victimless offences under the *Misuse of Drugs Act 1981* (that take in possession of small amounts of cannabis) and the *Road Traffic Act 1974*. Other offences include assaults occasioning bodily harm and criminal damage.

137 *Young Offenders Act 1994 (WA)*, s7.



The principles also give weight to the centrality of family, by emphasising their right to be involved in the process and their necessary role in the reintegration of young people.¹³⁸ These principles reflect a number of human rights principles, as illustrated earlier in this chapter. Accordingly, such principles should have an influence on how the legislation is interpreted. It has been suggested by youth lawyers, professionals in the justice system and a number of judicial officers, however, that human rights are frequently ignored in the practical operation of the Act.

The *Young Offenders Act 1994 (WA)* established 2 tiers of diversion: police cautioning and referral to a juvenile justice team. These options constitute the primary mechanisms for ensuring that the full powers of the judicial process are not deployed unnecessarily in cases where a less intrusive option would suffice.¹³⁹

WA remains one of the few states where the system of **police cautioning and referrals** is not codified in legislation and remains in police operational orders. This is part of a generally anachronistic architecture of controls typified by the still functioning *Police Act 1892*. Police Operational Order 24 governs police behaviour with juvenile offenders, including cautions and referrals to teams. In relation to diversion the Order reads:

The Western Australia Police Service adopts as policy, the concept of diversion as an appropriate option for dealing with the majority of juvenile offenders.

The diversionary options available under the Order are:

- informal warnings issued on the street, at a station or as part of the patrol function;
- formal written cautions; and
- referral to a Juvenile Justice Team.

The Operational Orders suggests:

The use of any of these options will depend on the circumstances surrounding the particular offence and the decision to proceed with any option will be left to the discretion of the member concerned.

Some of the circumstances surrounding the offence to which the police are to give consideration include:

- the time and circumstances of the offence;
- the age of the offender and degree of his or her involvement in the offence;
- the type of offence and the extent of public interest in ensuring that juvenile offenders are adequately dealt with by the justice system;
- the degree of remorse shown by the offender and the likelihood of re-offending;
- whether or not the offence is a trivial one or a technical breach only; and

138 *Young Offenders Act 1994 (WA)*,s7.

139 The recent creation of a *Drug Court* in WA has prompted debate about the possibility of extending the cautioning scheme to include minor drug offences such as the possession of cannabis.



- whether the offence is contained in Schedule 1 or Schedule 2 of the Young Offenders Act, and hence is excluded from diversion.¹⁴⁰

The Order goes on to say that, 'cautions should be not used to punish a juvenile, but to correct and direct behaviour'. In relation to second and subsequent cautions, it suggests:

Members may prefer second and subsequent cautions where there is a lapse of time between offences, the current or previous offence is minor or different, or the record of the child is not serious. A previous court or Juvenile Justice Team referral is not a bar to a formal caution.¹⁴¹

One of the key innovations in the *Young Offenders Act 1994 (WA)* was the creation of **juvenile justice teams** (JJTs).¹⁴² Like police cautioning, the juvenile justice teams had been operating on a trial basis in Metropolitan Perth since 1992. These were recommended by the State Government Advisory Committee on Young Offenders, following a review of similar strategies elsewhere.¹⁴³

The JJTs are inter-agency and coordinated by the Department of Justice. There are 5 full time teams operating in metropolitan Perth (Perth, Thornlie, Victoria Park, Wangara, Fremantle) and another two in outer metropolitan areas (Midland and Rockingham). In addition most country towns have *ad hoc* arrangements to convene teams when necessary (country based teams are discussed further below). The Act empowers the Department of Justice to appoint an officer of the department to coordinate a juvenile justice team and for the Commissioner of Police to appoint a member of the police force.¹⁴⁴ Also, 'if it is practicable' a representative from education and a 'member of an ethnic or other minority group' should be included on the team.¹⁴⁵ Teams are housed on Department of Justice premises.

A matter can be referred to a JJT if a young person accepts responsibility for the offence and chooses to have the matter dealt with by the JJT, otherwise the matter will be heard in court. The child must agree to participate and agree to

140 The police are also asked to be aware of Section 26 of the *Young Offenders Act 1994*, which calls on police to speedily release young people once a decision has been made to refer to a juvenile justice team (s26(1) and ensure that young people are not detained solely to make a referral decision (s26(2)).

141 Police Service of Western Australia, *Police Operational Orders* (No 24).

142 Division 2 of the Act establishes the teams and sets out the criteria to be employed when assessing whether a case is suitable for this form of diversion.

143 State Government Advisory Committee on Young Offenders (SGACYO), *Briefing paper on establishing family conferencing in Western Australia*, SGACYO, Perth, 1991.

144 *Young Offenders Act 1994 (WA)*, ss36-37.

145 *Young Offenders Act 1994 (WA)*, s37(2)(a) and (b). In practice education representatives have tended not to be employed on teams. Currently there is only one education worker covering all the metro teams, while it is only recently that the DOJ has paid more than lip service to involving a member of an ethnic minority on Teams.



any outcome.¹⁴⁶ Also, a 'responsible adult' must agree with the referral and be willing to participate.¹⁴⁷

Police Operational Order 24 permits police to refer young people on more than one occasion:

Previous referral is not a bar to future referral. If appropriate, the Juvenile Justice Team may deal with an offending child on more than one occasion. The Juvenile Justice Team may deal with an offending child who has committed more than one offence.

The JJT meeting should include the offender and responsible adult, the victim (if possible but not necessary) and support person. The meetings are chaired by the coordinator (a member of the Department of Justice). The police officer reads out the charges and may suggest the kind of dispositions the case might have received had it gone to court. Meetings tend to be quite 'scripted', in that the coordinator and police officer retain tight control over the meeting agenda, asking each participant to speak in turn and present their point of view. At the end of the meeting (assuming there is agreement) the offender and family sign a contract to fulfil certain conditions such as a verbal and/or written apology, restitution/reparation and community work. Assuming the conditions are fulfilled, the child receives a formal caution.

The JJTs have regular intake meetings where they vet cases. Some are returned to police, where a caution would be more appropriate. Decisions need to be unanimous. Teams can accept referrals at either the pre or post-court stages, from the police, prosecutors and the children's court. The fact that the process is convened and coordinated by the Department of Justice means that the system is not entirely police led, as in the Wagga model. However, the police still control the major pathways in and out of the system, making them the major players in decision making terms.

Diversion in WA assessed against best practice principles

In this section, this diversionary model is assessed against the best practice principles set out earlier in the chapter. There are significant problems with the WA diversionary scheme, particularly as it relates to Indigenous young people and how the scheme operates in regional areas outside Perth.

1) *Viable alternatives to detention*

There are particular concerns at the operation of the JJTs in country regions, which effectively means that diversion is not available as an alternative to detention. Juvenile justice workers outside of Perth act as coordinators of JJTs in addition to their other work responsibilities. There are no full time coordinators.

¹⁴⁶ *Young Offenders Act 1994* (WA), s32(1).

¹⁴⁷ *ibid*, s8. Role of responsible adult. In s8(c)'a responsible adult should be notified as soon as practicable after a young person is taken into custody or otherwise dealt with under this Act'. Section 30(1) states that 'Before it deals with an offence, a juvenile justice team is to give a responsible adult notice that it proposes to deal with the young person for the offence, and it can only proceed if a responsible adult is present and has indicated agreement with the proposal and a willingness to participate in the proceedings as the team sees fit'. For situations where a responsible adult can not be located see ss3-5.



The police member of the team is selected from staff at the local station. Cant and Downie in their 1998 evaluation of the *Young Offenders Act 1994* found that when there was a 'nominated' officer who regularly fulfilled the function, there tended to be smooth relationships within the team.¹⁴⁸ Otherwise there were often disagreements and uncertainty about the purpose of the process, leading to 'problems with both arranging and conducting meetings'. They drew the conclusion that, in general, police understanding of the teams was 'variable' and this had a detrimental effect on the work of the teams.¹⁴⁹

Statistics on the scheme show that cautioning and referrals to JJTs is much more prevalent in Perth. Most cautions (around 50 per cent) are given in the metropolitan areas of Perth. Country areas with higher numbers of Indigenous youth, such as the northern and eastern regions, accounted for less than 16 per cent of all cautions in 1999.¹⁵⁰ In relation to Juvenile Justice Teams it is difficult to establish geographic differences from the available statistics. Department of Justice statistics for 1999/2000 reveal that there were 2,414 referrals to Teams in the metro area in that year. In contrast there were 563 country referrals, of which 151 were referred from courts and 385 from the police. 94 of these referrals were for young Aboriginal people and 438 were for young non-Aboriginal people. Although unvariegated, these statistics reveal that diversion is largely an urban phenomenon in Western Australia, and that Indigenous youth appear to be referred to JJT's less frequently than non-Indigenous youth.

There is also a general dearth of community-based programs in country areas for Indigenous youth.¹⁵¹ Teams might try to refer a child to a program in an Indigenous organisation. However, it is widely accepted that these are very poorly funded and that the regions are generally disadvantaged in comparison with the metropolitan area across a range of services.¹⁵² There are few programs in country areas which specifically address problems associated with drugs, petrol and alcohol abuse for young people.

In the course of our consultations many Indigenous people stressed that the use of conferencing by JJTs was not, on its own, sufficient to deal with the range of other problems faced by Indigenous people. Criticisms were made that the diversion system does not recognise or resolve a range of issues including that:

- Indigenous families need to be supported after the conference. Indigenous organisations need to be involved in picking up the longer term and underlying issues;

148 Cant, R, and Downie, R, *Evaluation of the Young Offenders Act (1994)*, February 1998, p39. The evaluation was commissioned by the WA Ministry of Justice. It includes two separate but related evaluations of the Young Offenders Act itself and the Juvenile Justice Teams in particular. It made a number of detailed recommendations.

149 *ibid*, p39.

150 Ferrante, A, Fernandez, J and Loh, N, *Crime and justice statistics for Western Australia*, Perth, Crime Research centre, University of Western Australia, 2000, p115.

151 See further: Aboriginal Justice Council, *Our mob, our justice: keeping the vision alive: the 1998 monitoring report of the Royal Commission into Aboriginal Deaths in Custody*, Perth, 1999, p8.

152 *ibid*, p8. Note also the discussion of relative disadvantage of Western Australian ATSI regions by the Commonwealth Grants Commission in chapter 4 of this report.



- Many kids have chronic (glue) sniffing problems, alcohol and other drug problems. Many are victims of family violence;
- Families are confronted by problems of all kinds – there are multiple and compound crisis involving health and mental health, family violence; and
- Aboriginal people are often victims of crime too, but their victimization is of no concern to the system.

There is also concern at the lack of mechanisms in place to divert very young Indigenous people from contact with the criminal justice system, due to their tendency to become enmeshed at an early age. This enmeshment is compounded over time and Indigenous youth are more likely than non-Indigenous youth to be repeatedly arrested by the police.

Research by Broadhurst and Loh¹⁵³ and Harding and Maller¹⁵⁴ confirms the degree to which, once arrested, Indigenous people are almost certain to be arrested again. Harding and Maller's analysis of the age-arrest profiles in the WA offender population, focussing on 'arrest careers', concluded that the earlier the age of first arrest the greater the likelihood of become a 'career' offender. In relation to Aboriginal people they found:

that male Aborigines entering the arrest population on average commence their arrest careers at a younger age, accelerate them more rapidly, and accumulate them to a markedly greater extent than any of the other race/sex subdivisions.¹⁵⁵

The findings are bleak indeed:

The most striking observations are that the arrest profiles of male Aboriginal offenders begin at around 7 years of age and male Aborigines whose first arrest occurred at between 5 and 15 years of age can expect on average to have been arrested around 20 times by the age of 22.¹⁵⁶

They conclude that:

early entry into the criminal justice is itself a factor which exacerbates persistence...the longer that formal entry ...can be deferred, the fewer will be the subsequent contacts.¹⁵⁷

Broadhurst and Loh's data also illustrates the greater risk of Aboriginal youth being re-arrested. They found, for example, that a non-Aboriginal youth arrested at 18 years of age had a 78 per cent chance of being re-arrested, while an Aboriginal youth had a 94 per cent chance.¹⁵⁸

The primary aim of diversion should be to slow down the rate of entry into the system and reduce the likelihood of Indigenous youth being labelled repeat offenders. The current system is not equipped to meet this task.

153 Broadhurst, R and Loh, N, 'Re-arrest probabilities for the 1984-1993 Western Australian population: a survival analysis' (1995), 11, *Journal of Quantitative Criminology* p289.

154 Harding, H and Maller, R, 'An improved methodology for analysing age-arrest profiles: application to a Western Australian offender population' (1997), 13, *Journal of Quantitative Criminology*, p249.

155 *ibid*, p369.

156 *ibid*, p361.

157 *ibid*, p369.

158 Broadhurst and Loh, *op.cit*, p296.



2) Availability of diversion at all stages of the criminal justice process

The WA scheme makes diversion available at each point of contact with the system. There are, however, concerns as to whether this occurs in practice.

As discussed, diversionary processes in WA developed partly out of concern at the number of matters that appeared before court which could more appropriately be disposed of at earlier stages. Court diversion and processing was considered to be a back-stop in a system focused on diversion from the front end of the system.

Statistics on the operation of the scheme demonstrate that, while police referrals represent the main pathway to JJTs, there are a high number of court referrals. In 1999, there were 2,624 referrals from the police (2,214 distinct persons) compared with 1,335 from the court (1,173 distinct persons).¹⁵⁹ Given that these referrals occur *after* arrest and processing it needs to be asked, why are the police not referring many of these cases?

Statistics reveal that police referrals for Aboriginal people are slightly higher than court referrals: 23.3 per cent of police referred cases are Aboriginal as opposed to 17.7 per cent of court referred cases, while 76.7 per cent of police referred cases were non-Aboriginal and 41.6 per cent of court referrals were non-Aboriginal.¹⁶⁰ However, in 40 per cent of the court cases the race of the offender was 'unknown'.

Analysis of data kept by some juvenile justice teams reveals the referral rate of Indigenous youth from courts to be higher than that by the police. In 1999/2000, 56 per cent of Aboriginal referrals were from the court as opposed to 44 per cent by the police (statistics supplied by Fremantle Juvenile Justice Team). Clearly, a good many of the 'race unknowns' in court referrals are young Aboriginal people. The lack of clear court statistics on race is a serious barrier to monitoring the system for racial bias and there needs to be a concerted effort to improve the identification of Indigenous youth in the Children's Court.¹⁶¹ What these statistics suggest, however, is that young people do not get diverted at the earliest possible stage in many instances – which limits the availability of diversion and clearly militates against the purpose of diversion, namely moving away from processing through the formal criminal justice system.

While the *Young Offenders Act 1994 (WA)* does not prescribe a list of offences for which diversion is possible, it does contain a lengthy list of offences and circumstances which are excluded. This limits the ability of the decision-maker to take into account the circumstances of the offence and is much more restrictive. This compares poorly, for example, to the availability of diversion in other Australian schemes.

A further measure of availability is whether young people are precluded from participating in diversionary programs because they have previously participated. The Police Operational orders do not prohibit police from cautioning or referring to teams a number of times. Indeed, no upper ceiling is stipulated. Juvenile justice workers indicated that some young people have been cautioned up to 5

¹⁵⁹ *ibid*, p115.

¹⁶⁰ *ibid*, p115.

¹⁶¹ This was also recommended by Cant, R and Downie, R, *op.cit*, Ch.1, Part VI.



or 6 times. This appears to be exceptional however, with the 'informal tariff' appearing to be a two caution maximum and one referral to a justice team. We were also told by workers in the justice system that Aboriginal youth 'exhaust' the number of cautions they are allowed by the age of 11 years. Thereafter they are perceived by the police as 'repeat offenders' and are generally not eligible for diversion.

3) Discretion exercised on the basis of established criteria prescribed by law

There are very limited legislative criteria for diversionary processes in WA. Indeed, the *Young Offenders Act 1994 (WA)* essentially increased rather than curtailed the discretionary powers of the police. Diversionary processes were simply grafted onto existing police powers and no attempt was made to introduce any mechanisms of secondary gate-keeping, to vet police decisions or prevent unnecessary prosecutions being made. Decisions about cautioning and referrals to juvenile justice teams are also left to individual arresting officers. Guidance on making these decisions is left to police policy.

This lack of legislative guidance is compounded by the tendency for police policies to be seen as 'guidelines' rather than rules. The emphasis is on 'may' rather than 'must' when recommending the use of diversion. Cant and Downie's review of police perceptions of the legislation found that police did not feel they needed to adhere strictly to police regulations – including those ensuring fundamental safeguards for young people rights.¹⁶²

This stands in distinction to many other jurisdictions which have sought to ensure that police fully respect the rights of young people, racial minorities and other vulnerable groups through legislative protection. Sections 215-217 of the *Children, Young Persons and Their Families Act (New Zealand) 1989*, for example, sets down clear rules governing police behaviour when approaching, stopping, questioning and charging young people. Similar controls exist in England and Wales under the codes of practice connected to the *Police and Criminal Evidence Act*. These rules ensure that ethical conduct by police and respect for human rights is encouraged. Breach of the rules ensures both that any evidence obtained is deemed inadmissible in certain circumstances and disciplinary action taken against police officers. On the other hand, most commentators agree that a wide degree of discretion is inevitable, whatever the legislative regime controlling the police.¹⁶³

This lack of legislative clarity and oversight is particularly concerning for young Indigenous people.

At one level, cautioning processes have been successful in terms of reducing the overall numbers of young people being placed before the courts. Rates of court appearances and numbers of charges dealt with by the Children's Court have halved.¹⁶⁴ However, they have failed to make real in-roads into the rates of involvement of Indigenous people. Police lock-ups, courts and detention centres still warehouse Indigenous youth in large numbers. Indigenous juveniles make up anywhere between 60 to 70 per cent of all juveniles in corrective institutions

162 Cant, R and Downie, R, *op.cit.*, p4.

163 Waddington, P, *Policing citizens: Authority and rights*, UCL Press, London, 1999.

164 Aboriginal Justice Council, *op.cit.*



in WA at any one time despite constituting less than 4 per cent of the youth population in WA.¹⁶⁵

Indigenous youth accounted for just under 20 per cent of all cautions in WA in 1997. This percentage increased slightly to just over 22 per cent in 1999 – accounting for just over 2,000 of the 10,609 officially recorded cautions of that year.¹⁶⁶ On the one hand this seems high in terms of Indigenous representation in the general youth population of WA. However, it is still low in relation to their proportion of the prison population and the criminal justice system as a whole. Indigenous youth are not being cautioned at a rate commensurate with their level of contact with police. Instead of cautions, they are more likely to be arrested and charged than non-Indigenous juveniles.

A report by the Aboriginal Justice Council found that, while there was a slight decline in the number of Indigenous people arrested between 1991 and 1995 from 142 per 1,000 to 137 per 1,000, the rate of the decline was significantly less than for non-Aboriginal people, whose rate fell from 21 per 1,000 to 16 per 1,000.¹⁶⁷ This meant that the differential risk had in fact increased – from being 6.9 times more likely to be arrested, Indigenous people were now 8.3 times more likely.¹⁶⁸ The main source of the decline was in the area of juvenile arrests. However, even with a slight decline in the arrest rate, Aboriginal youth between the ages of 10-14 were still 25 times more likely to be arrested than a non-Aboriginal youths of the same age, and Aboriginal people between 15-17 years of age were 9.3 times more likely to be arrested.

This picture generally has not improved. The rate of over-representation has increased. A recent survey showed that Indigenous people generally are now 10 times more likely than non-Indigenous people to be arrested by the police.¹⁶⁹ Arrests rates since 1995 have remained constant.

Although Indigenous males are more likely to be arrested than Indigenous females, the differential risk of an Indigenous female being arrested compared to all WA women was even higher than the risk for Indigenous men. In 1994, Indigenous women were 18.2 times more likely to be arrested than other females in WA – almost twice that of males in that State.¹⁷⁰

Recent statistics by Ferrante and Loh offer little comfort. They show that access to diversion is still bifurcated on racial grounds – roughly half (54 per cent) of Aboriginal youths formally dealt with by police are diverted, as opposed to 80 per cent of non-Aboriginal youths.¹⁷¹

165 Australian Institute of Criminology, *Persons in Juvenile Corrective Institutions 1981-2000 with a Statistical review of the Year 2000*, Tables 4(a) to 4(c), pp10-12.

166 Ferrante, Fernandez and Loh, 2000, *op.cit*, Table VIII, p52.

167 Aboriginal Justice Council, *Our mob, our justice*, *op.cit*, p28.

168 *ibid*, p28.

169 Ferrante, A, Fernandez, J and Loh, N, 2000, *op.cit*, p44. Arrest means the laying of charges either by way of an arrest or summons by a police officer against a person alleged to have committed a criminal offence. It does not include juvenile cautions or minor traffic charges.

170 Boyd Hamilton Hunter, *Factors Underlying Indigenous Arrest Rates*, *Centre for Aboriginal Economic Policy Research*, ANU, 2001, R52.4, Table 3. The study is based on analysis of 1994 data.

171 Ferrante, A and Loh, N, *Aboriginal involvement in the Western Australian criminal justice system: a statistical review*, prepared for the Aboriginal Justice Council, Perth, Crime Research Centre, 2000.



Decisions about whether to caution, warn or charge a young person are not always made on the basis of the seriousness of the offence. A range of 'extra-judicial factors' may influence the decision making process, these include if:

- the child's 'attitude', appearance and demeanour are 'wrong' – some youths 'fail the attitude test';¹⁷²
- the young person is homeless;
- the young person is 'street present';
- the young person is part of some out-group or deviant sub-culture;
- there is a 'moral panic' or social anxieties associated with youth in a particular place and time; or
- the young person is from a non-mainstream background.

Lawyers and youth workers who have contact with Aboriginal youths in Perth expressed concern to us that decisions to approach, question, name check, search, detain, warn, caution and arrest young Indigenous people are often based upon these extra-judicial criteria. Taking a train to Perth from the suburbs, hanging out around and near Perth train station and walking in Northbridge makes them a target.

Their relationship with the police was the main issue Aboriginal young people in detention wanted to discuss with us.¹⁷³ All believed that they and other Indigenous youth were 'targeted' by police in public places.

Some Indigenous justice workers contacted during our consultations said they were angry and frustrated with the operation of the diversion system. For example:

A lot of our young people are not getting diverted when they could be, its police attitudes to our kids, a lot of police are ok, especially the ones who work on the teams, but a lot out there are callous. A couple of cautions and then off to court, rather than JJT.

Other workers said that the extensive number of charges young Indigenous people receive (and which, later, enmesh them in the system) are often trivial and emerge as a result of police intervention – such as resisting arrest, assault on the police, swearing.

4) *Training of law enforcement officials involved in the administration of diversion to meet the needs of young people*

Current police training is inadequate to deal with decision-making relating to diversion. Cant and Downie surveyed police officers to identify their degree of knowledge of the Act as it related to questions such as cautioning and JJT referral and concluded that:

Survey responses show that 37 per cent of respondents were either unsure or did not believe their level of understanding enabled them to meet the requirements (under the Act). This presents a clear training requirement that the Police Service must address.¹⁷⁴

172 Blagg, H and Wilkie, M, *op.cit.*

173 Discussions were held with young people in Banksia Hill Detention Center and on the Warminda Intensive Supervision Program.

174 Cant, R and Downie, R, *op.cit.*, p11.



The same survey also found that police in non-metropolitan areas were more reluctant to become engaged in the juvenile justice team process and did not see the process as 'police work'. Police recruits receive half a day's training on juvenile diversion issues at the Police Academy. On the job training is the responsibility of Perth-based Community Services Branch, although this function is about to be devolved to district training officers. The Community Services Branch has developed a training package for the regions and a representative of the Branch said that police were aware of their discretionary powers and had a grasp of the juvenile justice team process. According to this source, and other police contacted in Perth, many police simply did not want to exercise their discretion in this fashion and preferred to prosecute in many instances. They maintained that a 'generational shift' was required to change the culture of the police in favour of diversion.

A related concern is that there had been limited experience of police cautioning young people prior to the introduction of the *Young Offenders Act* in 1994, with the limited use of children's panels and trials of cautioning practices between 1991 and 1994. WA's scheme was introduced when the police were diverting very few cases. The WA police also rely on the judgement of general duties officers to make decisions about whether a child should be cautioned or prosecuted, rather than a specialised youth division or specialised youth officers.

5) *Diversion requires the informed consent of the child or his/her parents*

The *Young Offenders Act 1994 (WA)* requires that the young person and a responsible adult consents to participation in a referral to JJT. However, there are no safeguards such as the provision of legal advice and an interpreter if necessary, which has the potential to undermine the informed nature of the consent given (this is discussed further below).

Concern has also been expressed at the manner in which conferences have been convened by the JJTs, especially in regional areas, which can limit the participation of Indigenous youth. The Act allows for conference coordinators to appoint a representative to the Juvenile Justice Team of 'the young person's ethnic or minority group', where practicable.¹⁷⁵ This is a watered down response to the demands by Indigenous people that they should have a role as members of diversionary teams.¹⁷⁶ The evaluation of the Act by Cant and Downie in 1998 recommended that 'a greater effort be made... to engage Aboriginal families with the Team process'.¹⁷⁷ In response the Department of Justice extended the paid hours of sessional Aboriginal workers, who have been working with some Metropolitan teams on a part-time basis, and have created a full-time position of Aboriginal Coordinator in mid-2001.

The Coordinator position is intended to increase Indigenous involvement in the process by coordinating meetings involving Indigenous youth and contacting their families prior to the conference. Management suggests that the coordinator's work with 'problem families' in Fremantle has seen an 87 per cent

¹⁷⁵ *Young Offenders Act 1994 (WA)*, s37(2).

¹⁷⁶ SGACYO, *op.cit.*

¹⁷⁷ Cant, R and Downie, R, *op.cit.*, p72.



increase in their participation in conferencing. The introduction of more Indigenous people has increased Indigenous people's willingness to participate in the process. Aboriginal workers use their networks and knowledge of family groups to contact Indigenous people and explain the benefits of the juvenile justice team process. They bring knowledge of the family dynamics and Indigenous people tend to be more forthcoming when dealing with another Indigenous person. There are plans to ensure that all teams in the Metropolitan area have an Indigenous person working for at least 15 hours per week.

When the Teams were being formed in the early 1990s, the plan was to have an Indigenous worker on each team as a full-time position. The worker would be involved in individual cases but also have a broader community development role, linking to other Teams in relation to developments in Indigenous justice reforms, and facilitating dispute resolution with Indigenous people outside the criminal justice system. There are isolated examples of this kind of practice. The Midland JJT is developing close links with the local Aboriginal Reference Group (a body established as part of the Midland Cyclical Offender Intervention Project, an early intervention scheme established in the area).

Where they exist, Indigenous workers have been successful in locating and engaging with Indigenous families who are transient and difficult to reach. The workers are, however, sensitive to the potential for them to be used as 'black trackers' – hunting down recalcitrant families and bringing them into the justice system. They recognise that this could be a perception in some quarters but believed that the scheme – if genuinely diversionary – could be a positive experience and spare children and young people unnecessary involvement in the more formal justice system.

Indigenous workers were also anxious to stress that the conference itself is only a part of their involvement with families. While conferencing has been claimed as part of the 'justice model', families still have a range of welfare issues concerning poverty, homelessness, family violence and drugs, to deal with. Indigenous workers, therefore, inevitably become involved in these family issues, rather than just seeing their role in terms of ensuring Indigenous participation in the conferencing system.

The workers did not believe the system was an 'Aboriginal way' of dealing with things but as a kind of 'compromise' between an Indigenous practice and the non-Indigenous system. They find the format of the conferences too formalized and 'scripted' for Indigenous ways of discussing and resolving issues. Some suggested that there needs to be a number of conferences, with some involving just Indigenous people to resolve some of the deeper problems.

Workers also said that conferences sometimes go wrong when the police are too dominant and 'take over'. This is a particular problem in the country, where officers (and juvenile justice workers) do conference work on top of other duties and receive less training about appropriate practice in the conference setting. We have heard concerns that police sometimes use the conference as an 'inquisitorial process' to find out about other offences and inculcate other offenders. As country teams are not full time and juvenile justice officers arrange conferences on top of existing work-loads, court reports and case supervision inevitably take precedence over convening conferences.



Concerns were also expressed about the appropriateness of conferencing processes for younger children – under 14 years – who sometimes don't fully understand the process. Also, the conferences are sometimes too long and complex and the outcomes (in terms of amounts of community work) too excessive. In this respect, the process does not always take account of 'a child's sense of time' (as required under s7(k) of the *Young Offenders Act 1994* (WA)).

6) *Young people are provided with procedural safeguards throughout the diversionary process*

There is no statutory obligation in WA for interpreters to be used at any stage of the criminal justice system. Interpreters do not appear to be used during cautioning or during juvenile justice team meetings in a formal sense. Country workers suggested that Indigenous people might be brought in on an informal basis to interpret: an Indigenous person on the team – an Aboriginal Police Liaison Officer or Aboriginal Juvenile Justice worker – may play this role. However, questions of independence arise here. The Department of Justice is in the process of training 30 Indigenous interpreters (from various language groups in Western Australia) under a federal initiative managed by the Attorney General's Department. These would be used in the court and there are no equivalent plans to have interpreters at the investigation stage and during conferences.

Young people in detention told us during our consultations that the JJT process had been fair and that things had been explained to them. The majority of youth who had been cautioned also said that the police had explained what the reasons for the caution were and most had been given the caution with family present. Juvenile justice workers interviewed, on the other hand, believed that Indigenous youth currently do not get a fair go from the system. They stressed that Indigenous youth were not given opportunities for diversion, they tended to be cautioned once or twice then face court.

There is no provision similar to Queensland and South Australia ensuring that police must communicate in a manner understandable to a child.¹⁷⁸ There is also no provision for access to lawyers or child advocates in the diversionary process, only a responsible adult. Consultations revealed that this is not always favoured by conference facilitators who do not want to encourage an adversarial approach in the conference. While one can sympathize with the view that the restorative process should not be impeded or 'captured' by the formal legal system, this has to be balanced against the reality that participation in conferencing has potential legal outcomes for participants.

By comparison, in New Zealand, for example, the child can be represented by a lawyer or a lay advocate during a family conference and the process at all levels is subjected to legislative over-sight as well as a number of internal and external screening processes (within the police and from outside bodies). The *NSW Young Offenders Act 1997* (NSW) permits not only family and an adult chosen by the offender to attend but also a legal advisor (although not in their capacity as legal representatives except in certain cases). In the absence of

178 *Juvenile Justice Act 1992* (Qld), s15(1). *Young Offenders Act 1993* (SA), s2.5.1.



other screening or oversight processes in WA, there may need to be consideration for the legal representation for children.

This may require that juveniles be given information about access to legal advice when they are offered referral to JJTs, or that a youth advocate be recognised as entitled to attend JJTs as a support person, as suggested by Cant and Downie in their recommendations on the scheme.¹⁷⁹

One of the most serious concerns about the JJT diversionary process relates to the status of records of involvement in the process at some later judicial event. In discussions with workers on the juvenile justice teams (in Bunbury, Northam (country) & Victoria Park, Fremantle, and Thornlie (metropolitan)) we were told that a key 'selling point' of this alternative was that it would not lead to a criminal record.

This principle is under serious threat due to a new practice in the Perth Children's Court where the Police Prosecutor has been citing the numbers of cautions and referrals to a juvenile justice team by young people, even though they are often on entirely unrelated matters.¹⁸⁰ This practice has been going on for several years but has, according to youth lawyers, increased over the last six months. Although some judicial and police officers have suggested that these records are read out to establish the 'circumstances of the offence', they clearly breach the principles of diversion and may have the outcome of 'up-tariffing' young people when decisions are made regarding punishment.

The President of the Children's Court has given directions that previous referrals to teams and cautions should be counted as offences in certain instances – where they demonstrate a 'well established pattern of offending'. In one recent judgment¹⁸¹ the President opined that there may be offences, such as home burglary, that, while not scheduled under the Act are, nevertheless, 'serious' even though they may not have resulted in a court appearance (meaning that they had been referred to a team) and this should be taken into consideration when sentencing. In these circumstances, the child would be ineligible for referral to a team. In this particular case the President had over-ruled a referral to a JJT made by a Children's Court Magistrate, for a child who had been convicted of a home burglary and had previous convictions in New South Wales.¹⁸² The child was given a Community Order – a high tariff alternative to custody.

It is debatable under these circumstances whether the scheme is fulfilling a *diversionary* function at all if diversionary outcomes are being used against a young person in the formal court system. It is of great concern for a range of reasons. First, these cautions and the process of conferencing take place without children having had the benefit of legal council. Second, the fact that participation in conferences counts as a 'record' conflicts with the spirit of restorative justice principles which are premised on the belief that once an event has been resolved to the satisfaction of the parties directly involved then this should be the end of the matter. While there are obvious limits to this proposition, the balance, with

179 Cant, R and Downie, R, *op.cit.*, Part VI.

180 According to consultations with the WA Aboriginal Legal Service.

181 *Police v RMK (a child)* 2001, WA CC4.

182 *ibid.* s18.



juveniles, should be towards clear finality once a particular matter has been resolved.

A related point, is that the President of the Children's Court has made statements defining the principle of '*an established pattern of offending*' under the 1994 Act, in a particularly narrow way. Courts are being told only to refer matters to a juvenile justice team when the offender has not had a previous opportunity to attend, rather than when the case seems to be one amenable to restorative solutions. This, again, seriously limits juvenile justice teams to the level of being simply an addition to cautioning scheme.

7) *Young people are provided with human rights safeguards throughout the diversionary process*

As noted above, the *Young Offenders Act 1994 (WA)* is premised on a range of juvenile justice principles that reflect human rights standards. Despite this, this evaluation has demonstrated a number of ways that these safeguards are not met in practice, with concerns ranging from the failure to take the age and maturity of the young person into account, failure to promote the rehabilitation and social reintegration of the young offender and failure to ensure that diversionary options are culturally appropriate and non-discriminatory in their impact.

Clearly the most significant issue in this regard is the failure of Indigenous youth to benefit from diversion (through police or courts exercising their discretion to do so) combined with net-widening and formalisation of contact with the criminal system.

Worryingly, the existing rate of cautioning for Indigenous youth in WA has been achieved at the cost of significant net-widening. Although praising the 'remarkable' achievements of the cautioning system in diverting some 600 young people from the court in 1996, Cant and Downie also found evidence of net-widening with the police now 'formalising' through a written caution contacts that may previously have led to a verbal warning:

Twenty-one percent more young people had some formal contact with the juvenile justice system in 1996 than in 1994. This was due to a greater increase in the number being diverted from the court system. Some young people who would previously been dealt with informally by the police are now been given a formal caution.¹⁸³

Ferrante's analysis of long term trends in cautioning practices in WA also reveals significant net-widening for both Aboriginal and non-Aboriginal youth. However, an analysis of arrest and cautioning data by Ferrante suggests that there is significantly more net-widening occurring in relation to Indigenous youth than for non-Indigenous youth.¹⁸⁴ Her data suggests that, while arrest rates for Aboriginal youths have remained stable (in fact, shows a marginal increase of about 3 per cent since 1995) the rate of contact with the police has risen about 30 per cent over that period. The extent of net-widening for non-Indigenous

183 Cant, R and Downie, R, *op.cit*, p1.

184 Ferrante, A, *An analysis of police arrest statistics*, Perth, Crime Research Centre, University of Western Australia (unpublished), 2001.



youth is not quite as dramatic: arrests *decreased* by around 3 per cent and rates of contact increased by 18 per cent. This means that cautioning has occurred *on top of, rather than instead of*, arresting young Aboriginal people.

While some Aboriginal youths clearly are being given another chance by the police, it is of concern that many Aboriginal youths who would have been arrested prior to the introduction of cautioning are still being arrested but, in addition, the cautioning system seems to be netting them and some other, younger, less delinquent young people on other occasions for trivial offences that may have been ignored – or just verbally warned – under the previous regime.

8) *There are complaints and review mechanisms relating to the exercise of discretion to divert*

Section 28 of the *Young Offender Act 1994 (WA)* states that:

Instead of itself dealing with a young person who has been charged with an offence, the court may, whether or not the person has pleaded to the charge and whether or not the person has been found guilty of an offence, refer the matter for consideration by a juvenile justice team.

This provides a *de facto* though highly inadequate review process for police referral powers. This 'back-stop' role was intended to be used minimally, as police themselves perform the main gate-keeping and diversionary function. As noted above, however, the proportion of referrals by courts is so large as to suggest that police do not divert juveniles on sufficient occasions.

The WA Police Operational Orders do not provide a reliable mechanism for reviewing the initial police decision to arrest, caution or refer to a JJT, by a senior officer. Juvenile Justice Teams have only limited powers to vet police decision making. There is currently no mechanism for young people to appeal against decisions made in relation to cautions or JJT decisions and outcomes. The absence of legal representation for young people at the point of diversion is particularly worrying in light of this lack of safeguards.

9) *There exists independent monitoring and evaluation mechanisms for the scheme*

Section 237 of the *Young Offenders Act 1994* requires that an investigation and review of the Act is conducted after the expiration of five years following coming into operation of the Act. The Ministry of Justice commissioned Cant and Downie to undertake an extensive evaluation of the Act and the Juvenile Justice Teams, which was completed in 1998.

One concern about the adequacy of monitoring mechanisms that was raised by Cant and Downie in their review as a matter of urgency was the 'unacceptably high non-recording of ethnicity, or at least Aboriginality, on the children's court information system'. This continues to be a matter of great concern as it makes it more difficult to establish the relative rates of diversion for racial groups.

10) *Self-determination of Indigenous peoples*

At the beginning of this chapter, two alternative approaches to diversion were identified – a minimalist 'second chance' approach for minor or first offenders; and a more ambitious approach where diversion is about directing cases into



an alternative process of community justice. The WA scheme largely fits within the first description.

The focus is clearly on the juvenile justice teams as an early intervention option within the framework of the juvenile justice system, rather than as part of an overall shift in orientation. The reforms have brought 'restorative elements' in to the system without making the system as a whole 'restorative'. As such, diversionary schemes in WA do not meet the needs of Indigenous young people who quickly move beyond the need for a second chance.

A number of concerns have been raised in this section about the accessibility of diversionary options for Indigenous people, and the limited role for and participation of Indigenous people in these. At base, the process suffers from a lack of support from Indigenous people and is seen as culturally inappropriate. Given the crisis rates of removals of Indigenous juveniles through criminal justice processes, this is of serious concern and is totally unacceptable.

The process somehow has to be 'given back' to the Indigenous community. Currently, it is not working well enough for Indigenous people and their families. Diversionary program options for Indigenous young people, particularly in regional areas, need to be negotiated with Indigenous communities to ensure that they are relevant and able to meet the needs of the community.

The WA government needs to look closely at models of conferencing in other states, particularly in South Australia and New South Wales. NSW in particular has gone further than WA by employing a number of community people, including Indigenous people, to coordinate and run conferences in the community.¹⁸⁵ The dynamic established by having community people run conferences has been viewed by some observers familiar with schemes across Australia, as qualitatively different and less authoritarian than those run by criminal justice professionals.¹⁸⁶ They should also examine recent developments in other states which seek to increase, on a more equal basis, Aboriginal community involvement in sentencing processes, such as through circle sentencing trials in NSW;¹⁸⁷ Aboriginal or Nunga Court Days in Port Adelaide, Murray Bridge and Port Augusta in South Australia;¹⁸⁸ and Community Justice Groups in Queensland.

185 Trimboli, L, *An evaluation of the NSW youth justice conferencing scheme*, Sydney, NSW Bureau of Statistics, 2000.

186 Consultations with James MacDougal, Federation of Community Legal Centres. Mr MacDougal worked at the Youth Legal Service in Perth and in the Youth Conferencing Unit, Department of Juvenile Justice, NSW. He said, 'When police are present, particularly in a leadership role, people automatically look to them to be authoritative and lead. When a community person convenes a conference, it is more like a circle with no single, dominating authority'.

187 See: NSW AJAC, *Strengthening Community Justice*, *op.cit.*

188 See: www.courts.sa.gov.au/courts/magistrates/aboriginal_court_days.html.



Recommendations on diversion in WA

I recommend that the WA Government undertake the following steps to address the concerns raised in this report.

Recommendation 7: The *Young Offenders Act 1994 (WA)* be amended to include greater detail on the operation of diversionary options in WA, rather than matters integral to the process being contained in Police General Orders. The amendments should include the following as a minimum:

- create a presumption that police will divert young people unless a range of specified criteria are not met;
 - provide for review of decisions regarding diversion;
 - require that a young person is informed that they are entitled to access to a legal advocate at any stage of the process;
 - require that an interpreter be freely available at all stages in the process where there is doubt about the ability of the young person to understand the proceedings or express themselves in English; and
 - provide that previous cautions and justice team referrals cannot be cited in court as though they form part of a prior record.
-

Recommendation 8: The Department of Justice consult regional councils of the Aboriginal and Torres Strait Islander Commission and Aboriginal community organisations about the adequacy of current community based diversionary programs for Indigenous juvenile offenders, particularly in regional areas, and their form, organisation, management and coordination in the future.

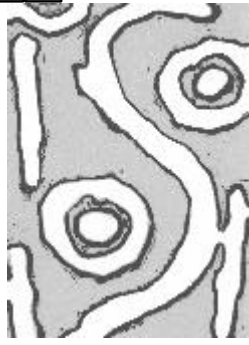
Recommendation 9: Juvenile Justice Teams and conferencing processes be adequately funded in regional areas. Funding be provided for the employment of Aboriginal workers, and the training of Aboriginal people in local communities to act as conference facilitators.

Recommendation 10: The Department of Justice coordinate the development of consistent record keeping on diversionary processes across all agencies, particularly the Department of Justice, Police and Children's Court. Record keeping must identify the ethnicity of offenders in order to identify the extent of any racial bias in referral processes. This data should be subject to ongoing and independent monitoring and evaluation.

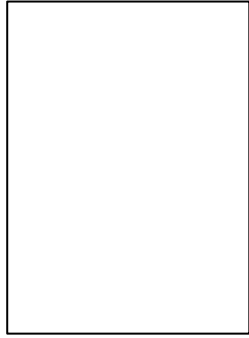


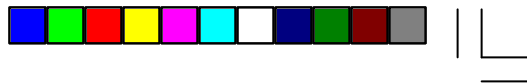
Conclusion

Given the level of contact of Indigenous people with criminal justice processes, and the integral role that juvenile offending plays in this, diversionary processes are essential to ensuring lasting reductions in Indigenous over-representation rates. Developments in the NT over the first year of operation of the pre-court diversionary scheme are encouraging, although there are significant concerns raised by the model chosen. In WA, the introduction of juvenile justice teams and the cautioning system have not lived up to expectations of a restorative approach. Both models raise significant issues about how best to ensure adequate Indigenous community participation in the criminal justice process. This review has provided guidance on these issues, through reference to long established and well recognised human rights principles for diversion.



Reconciliation progress report







Chapter 6

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Reconciliation – National progress one year on

In its final recommendations, the Council for Aboriginal Reconciliation proposed that there be a legislative requirement for the Social Justice Commissioner to monitor progress towards reconciliation on an annual basis. In the *Social Justice Report 2000* it was noted that while legislative amendment to this end was desirable, this task could be undertaken under my existing functions. Accordingly, I undertook to provide an annual evaluation of progress towards reconciliation as part of the social justice report. This chapter constitutes the review of the first year since the Council's final report and recommendations to Parliament. It does not seek to provide an exhaustive audit of all programs and policies that can be seen as consistent with the approach recommended by the Council. As discussed in the introductory chapter, such an approach would replicate to an extent the unsatisfactory approach to implementation adopted for the Royal Commission into Aboriginal Deaths in Custody. Instead, this chapter examines the measures adopted to implement reconciliation and ensure that it is ongoing; and processes for measuring and evaluating outcomes of these commitments. It seeks to determine whether the federal government has begun to implement the recommendations of the Council for Aboriginal Reconciliation, as well as the fourteen recommendations on reconciliation which were contained in the *Social Justice Report 2000*. It particularly focuses on the necessity for national leadership to maintain the momentum created over ten years by the Council.

The year 2000: the first phase of reconciliation ends

The year 2000 marked the end of the first, formal, phase of reconciliation in which the Council for Aboriginal Reconciliation (herein CAR or the Council) identified progress to date and the job still ahead for reconciliation to be achieved. At no time did the Council suggest that reconciliation would be achieved by 2000. It was also the year in which the Council handed over control of the reconciliation process to governments and the Australian people to advance (after taking into consideration the work and recommendations of the



Council). After ten years of reconciliation, in which there was increased understanding among the broader community of the circumstances of Indigenous people, the time came for governments to make commitments to addressing the issues that had been raised.

During its final year, the Council for Aboriginal Reconciliation presented to the nation the *Australian Declaration Towards Reconciliation* and the *Roadmap for Reconciliation* at Corroboree 2000 on 27 May 2000. The Council advised the Prime Minister that these documents constituted its formal recommendations in relation to the 'nature and content' of documents of reconciliation, as required to be submitted at the end of the Council's term under section 6(1)(h) of the *Council for Aboriginal Reconciliation Act 1991* (Cth). The Roadmap involved four strategies for reconciliation: overcoming disadvantage; achieving economic independence; recognition of Indigenous rights; and sustaining the reconciliation process.

Corroboree 2000 was followed the next day by the walk across Sydney Harbour Bridge and walks in other cities, in what has been the strongest display of the 'people's movement' for reconciliation to date. The final report of the Council for Aboriginal Reconciliation, *Australia's challenge*, was then tabled in federal Parliament on 7 December 2000.¹ *Australia's challenge* made a further 6 recommendations to the Prime Minister in relation to the 'manner of giving effect' to the documents of reconciliation which it had presented at Corroboree 2000.

The six recommendations of the final report focused on the processes necessary to implement reconciliation by ensuring that governments were accountable for their efforts, through the establishment of national commitments and monitoring and evaluation mechanisms, as well as ensuring that they proceeded in a manner that involved negotiation with Indigenous peoples. The 6 recommendations called for:

- The Council of Australian Governments to agree to implement and monitor a national framework for all governments and ASTIC to work to overcome Indigenous disadvantage through setting benchmarks that are measurable, have timelines, are agreed with Indigenous peoples and publicly reported (recommendation 1);
- All parliaments and local governments to pass formal motions of support for the two documents of reconciliation (the Declaration and the Roadmap) and to enshrine their principles in appropriate legislation and determine how the key recommendations can be implemented in their jurisdictions (recommendation 2);
- The federal Parliament to prepare legislation for a referendum to recognise Indigenous people as first peoples in the preamble to the Constitution and remove section 25 of the Constitution, and introduce a constitutional prohibition of racial discrimination (recommendation 3);
- All sectors of society affirm the declaration and take steps to action the roadmap, as well as provide resources for reconciliation, undertake educational and public awareness activities to improve understanding and relations, and support Reconciliation Australia (recommendation 4);

¹ Council for Aboriginal Reconciliation, *Australia's Challenge*, CAR, Canberra 2000.



- Each government and parliament recognise that the settlement of Australia took place without consent or treaty and accept the desirability of negotiating agreements or treaties to progress reconciliation, and enter into negotiations to establish a process to achieve this purpose and to ensure adequate protection of the rights of Indigenous peoples (recommendation 5); and
- The federal Parliament enact legislation to put into place a process for resolving unfinished business and to commence a treaty or agreement process (a draft *Reconciliation Bill* was appended to the report as a draft)(recommendation 6).

Having met its obligations to recommend to the federal Parliament the appropriate processes for achieving reconciliation, the Council for Aboriginal Reconciliation ceased to exist on 31 December 2000 and the first ten year phase of the reconciliation process ended.

The *Social Justice Report 2000* was transmitted to the federal Attorney-General on 21 December 2000 and tabled in parliament 3 months later on 28 March 2001. It outlined a human rights framework for reconciliation, to ensure the adequate protection of Indigenous rights during the next implementation phase of the reconciliation process. The report outlined a rights framework for reconciliation, based on the following four inter-related principles:

- *No discrimination*: A guarantee of equal treatment and protection for all, extending to recognising cultural distinctiveness of Indigenous peoples and the adoption of special measures to redress historically derived disadvantage;
- *Progressive realisation*: The commitment of sufficient resources through well-targeted programs to ensure adequate progress in the realization of rights on a non-discriminatory basis;
- *Effective participation*: ensuring the participation of Indigenous people in decisions that affect them, including in the design and delivery of programs; and
- *Effective remedies*: the provision of mechanisms for redress where human rights are violated.

It identified three key structural areas for this framework to be implemented, namely redressing Indigenous disadvantage and ensuring progressive realisation; strengthening Indigenous governance; and recognising and protecting Indigenous rights in a federal system. The report recommended fourteen recommendations to progress this framework, the features of which were:

- An unqualified national commitment to redressing Indigenous disadvantage through the adoption of a long term strategy which progressively reduces the level of disadvantage and ensures whole of government and cross-governmental coordination;
- The facilitation of adequate, nationally consistent data collection to guide decision making and reporting, with appropriate monitoring and evaluation mechanisms;
- The agreement of benchmarks and targeted outcomes through negotiation with Indigenous peoples and organisations, state, territory



and local governments and service delivery organisations, with clear timeframes for achieving longer term and short term goals;

- National leadership to facilitate inter-governmental cooperation and coordination;
- The development of greater partnership approaches to ensure the full and effective participation of Indigenous peoples in the design and delivery of services; and
- The adequate protection of human rights, including through constitutional protection, and negotiations on mechanisms such as agreements and treaties to overcome the structural inequalities caused by the systemic racism and lack of recognition of Indigenous cultures in the past.²

The recommendations of the *Social Justice Report 2000* complement those of the Council for Aboriginal Reconciliation, and specify the central position that human rights must take for meaningful reconciliation to be achieved. It is appropriate that these two sets of recommendations be examined together in determining the adequacy of progress towards reconciliation at the end of its first phase.

Implementing reconciliation

In 1996, the Aboriginal and Torres Strait Islander Social Justice Commissioner prepared a report on Indigenous Deaths in Custody from 1989-1996 which considered the appropriateness of the implementation process for the Royal Commission recommendations.³

The report identified a number of stages in an adequate implementation process, which include reviewing current activities; developing policies and programs; setting goals or targets; allocating responsibility for implementation; and establishing evaluation mechanisms.⁴

The report found that monitoring was not useful unless there is a considered plan for implementation of the Royal Commission's recommendations. It noted that the lack of holistic, whole of government approaches to the Royal Commission resulted in a 'public affairs' approach to monitoring and reporting, which listed existing programs and initiatives under the guise of being a response to the recommendations of the Royal Commission. In many instances, this was done at the end of a reporting period and therefore with no conscious consideration of the implications of the recommendations for program design and delivery. The Social Justice Commissioner's report observed that 'state agencies responsible for the implementation of recommendations reach the end of their reporting cycle without any coherent plan for the implementation, and without real ability to assess progress'.⁵

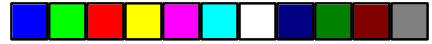
2 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC, Sydney, 2000, pp130-132, Recommendations 1-14.

3 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous deaths in custody 1989-1996: A report prepared for the Aboriginal and Torres Strait Islander Commission*, Office of Public Affairs, ATSIC, Woden, ACT, October 1996.

4 *ibid*, p257.

5 *ibid*, p267.

Social Justice Report 2001



A pivotal issue identified by the report for improving reporting mechanisms was the need to ensure state and territory accountability with the federal system:

the mechanics of the federal system work against accountability. The Royal Commission was a Commonwealth undertaking. The Commonwealth has a funding role, a leadership role in pressing the states for implementation, and an operational role in limited areas. But the recommendations were largely directed at state and territory governments and agencies⁶...

The report suggested that state and territory accountability could be improved through the adoption of a more active leadership role by the Commonwealth, including forms of leverage to ensure compliance such as performance conditions on grants to states and territories.

In relation to reconciliation, an initial question which needs to be considered is what constitutes a response to the recommendations of the Council for Aboriginal Reconciliation and the social justice report. It is reasonable to expect that at the end of a ten year process, governments would at a minimum engage in the stages outlined above.

It is expected that they would review their current activities through consultation with Indigenous people, given the concerns and priorities identified by the recommendations, and that this review process would feed into the development of ongoing and new policy and program initiatives. It is also expected as an absolute minimum that they would identify targets and benchmarks against which their performance can be measured and for which they can be held accountable. And it is further expected that they would identify lead agencies that are responsible for carrying out particular initiatives as well as establish mechanisms by which efforts can be evaluated.

It can also be reasonably expected that a ten year, multi-million dollar process, which is of such pivotal importance to the development of Australian society, would receive a formal response so that all members of the Australian community are clear as to the level of commitment provided by the government.

We should also expect national coordination of reconciliation in order to prevent a repeat of the mistakes of the past, especially in regard to ensuring adequate accountability, transparency, effective monitoring and long-term planning.

Twelve months on from the release of the Council's final report, however, governments have once more provided words of support for the Council's approach and the reconciliation process in general but have not engaged in any of these stages of implementation. None has offered a formal response to the final recommendations of the Council.⁷ In their report card on reconciliation released on 28 November 2001, Reconciliation Australia Co-Chairs Fred Chaney and Shelley Reys noted a 'lack of progress and unfinished business on several fronts, including... little response from governments as yet to the final recommendations of the Council for Aboriginal Reconciliation, which were released in the Council's final report a year ago'.⁸

6 *ibid*, p258.

7 See the overview of state and territory developments in Appendix Two of this report.

8 Reconciliation Australia, 'The reconciliation report card and the reconciliation test', Media release, 28 November 2001.



The federal government's response to reconciliation

[T]here can be no doubt that the mood of the Australian community is overwhelmingly in favour of reconciliation. It is and should be an unstoppable force.⁹

Prime Minister, Launch of the Council for Aboriginal Reconciliation's Final Report to Parliament

This chapter focuses on the response of the federal government, and its leadership role in relation to the states and territories. This section examines six key features of the government's approach to reconciliation over the past eighteen months. An overview of processes which have been initiated in the states and territories is considered in brief in Appendix Two.

1) *Direct responses to the reconciliation documents and final report*

One could expect that the documents which were the outcome of a ten-year process would be met with an all encompassing national response. The Council of Australian Governments (COAG), led by the Prime Minister, has agreed a communiqué on reconciliation which adopts the first recommendation of the Council for Aboriginal Reconciliation. Aside from this initiative (the significance of the COAG commitment is discussed further below), there has been no formal, comprehensive public response by the federal government to the reconciliation documents handed to the government at Corroboree 2000 or the recommendations of the Council for Aboriginal Reconciliation's final report of December 2000. This is despite the passage of twelve months since the final report and eighteen months since the documents of reconciliation were released. There is limited material available which explicitly identifies the government's view on the recommendations in anything more than a general sense. The most specific material that exists is a press statement issued prior to Corroboree 2000, and speeches by the Prime Minister at Corroboree 2000 and the launch of the final report of the Council.

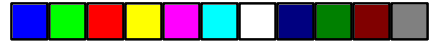
On the eve of Corroboree 2000, the Prime Minister released a press release which stated in relation to the Australian Declaration Towards Reconciliation that:

although there was significant agreement between the government and the Council for Aboriginal Reconciliation, in several areas it has not been possible for the government to give its full support to the document finally adopted by the Council... The areas of difference relate to customary law, the general application of the laws of Australia to all citizens, self determination and a national apology as distinct from an expression of sorrow and sincere regret.¹⁰

In relation to the *Roadmap for Reconciliation* the Prime Minister commented that 'there are numerous points of agreement. However, on some important aspects, the Minister assisting me on Reconciliation has informed the Council

9 Howard, the Hon J, 'Address at the presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation', *Transcript*, 7 December 2000, p1.

10 Prime Minister, 'Reconciliation documents', Media release, 11 May 2000.



of the government's reservations'.¹¹ It has been reported that the government had particular difficulties with the strategy for the recognition of rights, but at no stage since the release of the documents have the government explicitly outlined those areas of the documents with which they have reservations.

In the press release, the Prime Minister also stated:

Although there will be an inevitable focus on these areas of difference, it remains the fact that there is common ground between the government and the Council on most of the sentiments contained in the document. It is also the case that there is common commitment to the process of reconciliation.¹²

Statements such as this, which assure people that the government is committed to reconciliation, have been regularly made over the past eighteen months without any discussion of what exactly they are committed to. In relation to the final report of the Council for Aboriginal Reconciliation, for example, the Prime Minister stated at the launch that:

We will consider the propositions that are contained in the document. We will of course as a government consider them against the background of positions that we have stated previously. But I can assure you... that we will consider them in a spirit of immense good will and a desire to the maximum extent possible, given some different perspectives, to achieve the maximum level of agreement and the maximum level of harmony... I can assure you that reconciliation will, notwithstanding the expiry of the Council's legislative remit, remain a major focus of the Government.¹³

The only response to specific recommendations of the final report can be found in a question on notice in Parliament on the day that the final report was released. The Prime Minister stated:

Without in any way wishing to walk away from the spirit that was displayed at this morning's breakfast... the government has certain reservations about the concept of a treaty. What I had to say this morning was seen as a clear statement of very strong support for reconciliation. What I had to say this morning was said against the background of the views that we had previously expressed in relation to a treaty, and those views remain... we [must] try to focus as much as we possibly can on those areas where all of us agree, and there are many areas of agreement in relation to reconciliation... Those things where we agree on reconciliation are much greater, more important, stronger and more enduring than those areas where we disagree.¹⁴

On 5 April 2001, Senator Ridgeway lodged a Private Members Bill in the Senate which sought to implement recommendation 6 of the final report of the Council for Aboriginal Reconciliation. The bill was the draft legislation appended to the Council's final report and included legislative recognition of Aboriginal and Torres

11 *ibid.*

12 *ibid.*

13 Howard, the Hon J, 'Address at the presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation', *op.cit.*, p2.

14 Howard, The Hon J, *Aboriginals; Reconciliation*, Question on notice, Hansard – House of Representatives, 7 December 2000, p23651.



Strait Islander Peoples as the First Peoples of Australia; establishment of a series of National Reconciliation Conventions; and a requirement that the Prime Minister commence negotiations with ATSIC to develop a process by way of a treaty or an agreement to address the unresolved issues of reconciliation. Implementation of the Bill's objectives require monitoring on a regular basis by the Aboriginal and Torres Strait Islander Social Justice Commissioner, a Joint Parliamentary Committee, and an independent body appointed by the Minister. Consideration of the Bill was the only other potential occasion for the recommendations of the Council for Aboriginal Reconciliation to be discussed in Parliament. However, the Bill is yet to appear on the notice sheets for Senate debate.

Most other material about the government's approach to reconciliation tell us generally that they are committed to practical reconciliation. For example, in the Menzies lecture the Prime Minister stated:

Symbolic expressions of support are important. However, they are given real meaning when backed with improvements in living standards. That is why we place a great degree of emphasis on practical reconciliation... True reconciliation is, in our view, to be best found within practical means to improve the well-being and happiness of indigenous Australians and raising standards to levels enjoyed and expected by all of us.¹⁵

But again, this material is so general that it does not tell us *specifically* what their response to the recommendations of the Council is. Indeed, the government have never outlined whether the recommendations of the Council are consistent or not with practical reconciliation. It impliedly tells us that there are some things with which they do not agree – but not what they are or why.

In terms of a process of implementation it is difficult, in fact, to identify any public material that demonstrates that the government has engaged in a good faith process to consider the Council's recommendations through reviewing their current programs and policies and consulting and negotiating with Indigenous peoples about ways to improve these. Indeed, there has been no follow up to the statement by the Prime Minister on the day of the launch of the Council's final report that:

I have received on behalf of the government... the final report of the council. It contains a number of recommendations. We will consider all of those recommendations.¹⁶

Indeed, my concern with the lack of response to the reconciliation documents by the government goes further than this. Not only has the federal government not explicitly responded to the CAR documents, they have quite deliberately sought to shut down debate and avoid any engagement about them by stating that they are committed to practical reconciliation.

An example which illustrates these attempts to close the debate is the response of the government to last year's *Social Justice Report*. In his letter advising me that the report had been tabled in parliament, the Attorney-General stated that

15 Howard, The Hon J, 'Perspectives on Aboriginal and Torres Strait Islander issues', Menzies Series Lecture, 13 December 2000, pp3-4.

16 Howard, The Hon J, *Aboriginals: Reconciliation, op.cit.*



the 'report raises many issues important to the government. The report will be a helpful resource as the Government considers its ongoing approach to these issues'.¹⁷ In a joint press release with the Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs the day before, the Attorney-General stated that 'the government acknowledges the important work of the Social Justice Commissioner in helping to draw attention to the profound levels of disadvantage faced by Indigenous Australians' and that the government 'are pleased that the Social Justice Report commends the government's action in relation to the number of Indigenous-specific policies'.¹⁸ With praise accepted, the news release then considered the critical aspects of the report as follows:

It is not unexpected that the Social Justice Report includes a number of criticisms but the government believes that these add nothing new to the debate about Indigenous rights and reconciliation in Australia.¹⁹

There is no mention of the existence of fourteen recommendations in the report, and no response to any of them. While I don't agree with the assessment of the report's contents in any way, the rejection of a series of criticisms of the government on the basis that they are 'not new' simply does not address the point. This merely admits that the criticisms have been made at sometime in the past and dismisses them on this basis – pretending they are no longer relevant. It is of course one of the greatest frustrations for Indigenous people that many of the criticisms of government policies, and many of the solutions, have been identified time and again. Their re-emergence suggests the inadequacy of government responses, not any inherent flaw in the recommendations. Often it is not innovation or 'newness' that is required – merely application of existing commitments or of knowledge learnt.

The function under which this report is completed states that 'the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, *and including recommendations as to the action that should be taken* to ensure the exercise and enjoyment of human rights by those persons'.²⁰ The legislation also requires that the Attorney-General table the report in Parliament. In other words, the Commissioner is obliged to submit recommendations where appropriate to the federal Parliament through the Minister's tabling. I believe that this requirement to submit recommendations to the federal Parliament, which provides public scrutiny of the government's approach, is accompanied by an expectation from Parliament that the government will inform it of its response to the report. In the conclusion of this chapter I make recommendations which relate to these concerns that I have raised.

17 Attorney-General, Letter to Commissioner Jonas, 29 March 2001.

18 Attorney-General and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, 'Social Justice and Native Title Reports', Joint News Release, 28 March 2001.

19 *ibid.*

20 Section 46C(1), *Human Rights and Equal Opportunity Commission Act 1986* (Cth).



2) *The national communiqué by the Council of Australian Governments*

An important response to the recommendations of CAR has been provided by the agreement by the Council of Australian Governments (COAG) to a communiqué on reconciliation on 3 November 2000.²¹ The communiqué predates, but is consistent with, recommendation 1 of CAR's final report.

The Council of Australian Governments is comprised of the Prime Minister, Premiers and Chief Ministers of the states and territories, and the President of the Australian Local Government Association (ALGA).

The communiqué acknowledges the work of CAR and commits itself to advancing reconciliation in regard to social and economic disadvantage through a nationally-coordinated reconciliation framework. COAG's approach is based on partnerships and shared responsibilities with Indigenous communities; programme flexibility; and coordination between government agencies, with a focus on local communities and outcomes. Its three agreed priority areas for action are community leadership; reviewing and re-engineering programmes and services to achieve better outcomes for Indigenous peoples; and building links between the business sector and Indigenous communities to advance economic independence. The communiqué provides for periodic review of progress on reconciliation, with its first review to take place at the end of a twelve month period.

Under this framework, 25 Commonwealth/State Ministerial Councils are to develop action plans, benchmarks and reporting strategies within 12 months for improving outcomes for Indigenous people. The Ministerial Council on Aboriginal and Torres Strait Islander Affairs (MCATSIA) is to coordinate and monitor this process, and was required to report back to COAG in November 2001 on the Councils' action plans and strategies. MCATSIA's role is also to include advising COAG about where gaps in policy and program development and service delivery remain, and where further improvements can be made in producing sustainable outcomes for Indigenous people. At this stage, action plans have been developed, ratified and endorsed but the progress report will not be available to COAG until early 2002, and it is yet to be decided whether it will be a public document. Given the significance of the progress report to advancing reconciliation it would be in the national interest for this document to be available for comment and evaluation.

The communiqué is a significant development to progress reconciliation. It cannot, however, be seen as a total response to the recommendations of CAR or by itself as an adequate response of governments. This is due first to the fact that the communiqué does not respond to significant aspects of the Council for Aboriginal Reconciliation's recommendations, particularly issues that relate to the recognition of rights and some of the symbolic aspects of CAR's proposals.

The CAR chairperson and the Deputy Chairperson welcomed COAG's leadership role and the commitments made toward reconciliation, but also warned that 'the 1992 COAG National Commitment is an example of fine words

21 Prime Minister, 'Council of Australian Governments communiqué', Press Release, 3 November 2000; For updated information see: Prime Minister, 'Council of Australia Government's meeting Canberra communiqué', Press Release, 8 June 2001.



that produced no real or lasting outcomes, and this 2000 agreement must not repeat this experience'.²²

While COAG's commitments to reconciliation are consistent to an extent with some of the recommendations in the *Social Justice Report 2000* that relate to the making of a long term national commitment to redressing Indigenous disadvantage,²³ I remain concerned about the COAG arrangement. In relation to the monitoring of *Bringing them home* by MCATSIA on behalf of COAG, I have previously expressed concerns relating to the insufficient information that is publicly available which limits the accountability of governments. I also expressed concerns about the adequacy of monitoring processes, lack of consultation with Indigenous people and lack of independence in the evaluation of government responses.²⁴ This also applies to the approach to reconciliation.

3) *Reconciliation Australia and Reconciliation Place*

In the past year the federal government made the following contributions to the ongoing reconciliation process: seed funding for the establishment of Reconciliation Australia; full tax deductibility status for all donations to Reconciliation Australia;²⁵ and funding for the construction of a monument to reconciliation to be located in the Parliamentary triangle and named Reconciliation Place.

On 22 May 2001, the government announced the creation of Reconciliation Place in the Parliamentary triangle in Canberra. The announcement noted that:

The development of a reconciliation square would be historic as it would represent the first truly integrated national symbol recognising indigenous people and our desire as a nation to share a harmonious future. [It]...will place the reconciliation process physically and symbolically at the heart of Australia's democratic life and institutions. It will signify the importance the government places on the ongoing process of reconciliation and be a prominent symbol of the nation's commitment to healing the wounds of the past.²⁶

The square, and memorial contained within it, is intended to acknowledge 'the history of the nation's first people; our shared history and common bonds; the separation of many indigenous people from their families as a result of past practices, and the ongoing consequences; and the significant achievements of indigenous people',²⁷ among other things.

22 Council for Aboriginal Reconciliation, 'Council welcomes COAG agreement on reconciliation and calls for actions to back up the words', Media release, 3 November 2000.

23 This was noted by the government in responding to my report: Attorney-General and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, *Social Justice and Native Title Reports*, Joint media release, 28 March 2001.

24 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Senate Legal and Constitutional References Committee inquiry into the stolen generation*, HREOC Sydney 2000, http://www.hreoc.gov.au/social_justice/senate_submission/index.html.

25 See further: Reconciliation Australia, *Strategic Plan 2001-2003*, Reconciliation Australia, Canberra 2001.

26 Prime Minister, 'Reconciliation square in Canberra', Press Release, 22 May 2000.

27 *ibid.*



Since this announcement, there has been significant disquiet among Indigenous people over the lack of consultation about the contents of the square, the design of the square as well as a number of components contained within. Representative organisations of Indigenous people forcibly removed from their families, for example, have protested at the manner of the depiction of their experiences in the monument. In their first Reconciliation report card, Reconciliation Australia expressed concern at the lack of adequate consultation with the stolen generations or the organisations representing them, and put on public record the Board's belief that 'the process of developing the new Reconciliation Place in Canberra did not adequately reflect the goals or the spirit of reconciliation.' They stated that:

To apply the Reconciliation Test to Reconciliation Place is to ask whether the manner of establishing it is consistent with the Prime Minister's stated intention of contributing to reconciliation. In particular, does it reflect a true partnership with Indigenous peoples – a shared journey together?²⁸

As the Canberra Times commented on the government's approach to the building of Reconciliation Place:

[I]t appears to reflect a European mindset that is the antithesis of the attitudes that it is seeking to commemorate. It is almost as though reconciliation, like so much else in the Aboriginal story, is to be imposed on indigenous Australians.²⁹

Reconciliation Place has the potential to provide long overdue acknowledgement to the place of Indigenous Australians in our history. Early indications are that it may not meet this purpose, and may in fact contribute to further alienation and distrust for many Indigenous people.

The government has also provided \$5.5 million funding for the establishment of Reconciliation Australia, as well as tax deductibility status for all donations. It is an independent, non-profit private company established by CAR to maintain a national focus for the reconciliation process and the people's movement for reconciliation, to report on progress to the Australian community, circulate information, encourage partnerships and provide forums for discussion.

Reconciliation Australia is in the process of developing partnerships with sectors of the Australian community, with a particular emphasis on establishing partnerships with other non-government organizations that result in tangible outcomes for Indigenous peoples. Partnerships have been initiated with Indigenous Business Australia the National Institute of Governance, as well as with the Aboriginal and Torres Strait Islander Commission and state and territory Governments.

Reconciliation Australia's strategic plan for 2001-2003 targets three goals based on the reconciliation documents with specific action areas to progress – achieve social and economic equity for Indigenous Australians; strengthen the people's movement for reconciliation; and acknowledge the past and build a framework for a shared future. Some of these action areas also link in with the COAG commitments, including adoption of a proactive role to encourage rigorous

28 Reconciliation Australia, 'The reconciliation report card and the reconciliation test', *op.cit.*, p2.

29 'Memorial may deepen the divide', *The Canberra Times*, 1 December 2001, p7.



monitoring of Australian governments; identification of best practice in service delivery; improving Indigenous access to banking and financial services, identification and promotion of best practice in Indigenous governance through the provision of appropriate training, education and capacity-building; promotion of Indigenous economic self-sufficiency; and establishment of a national support network for youth mentoring and of a national friends for reconciliation program.

The efforts that have been made by Reconciliation Australia to date demonstrate much potential. However, it appears that the Federal Government has effectively transferred responsibility for moving forward the reconciliation process to a private, non-government institution. Concerns with this approach include the following.

Reconciliation Australia has been presented by the federal government as the 'successor'³⁰ to the Council for Aboriginal Reconciliation. There are, however, significant differences between the Council and Reconciliation Australia. As stated, Reconciliation Australia is a not-for profit private company. It is not a government authority and its operation and objectives have not been mandated by Parliament. Its relationship with government at all levels is accordingly based on goodwill rather than any mandatory requirements.

Reconciliation Australia is not funded sufficiently to be the national coordinator of reconciliation. The amount of seed funding provided by the government, for example, is the equivalent of six months of the operational costs for the Council for Aboriginal Reconciliation. Reconciliation Australia is reliant on fundraising activities with the corporate and community sectors to ensure its viability and effectiveness into the future. Of the \$5.5 million provided by the federal government, Reconciliation Australia has budgeted \$2 million for its operating costs over the next three years, and has invested and maintained \$3 million at a level consistent with CPI (the remaining \$0.5 million of the funding provided was for payment of GST.)

As a result of this funding situation, Reconciliation Australia clearly will not have the capacity that the Council for Aboriginal Reconciliation did to provide ongoing, nationally significant public awareness activities regarding reconciliation. There is a danger that the reconciliation walks from last year will be the high watermark of support for reconciliation, as national attention (necessarily related to the ability of Reconciliation Australia and the government to keep a national profile for reconciliation) slowly dissipates.

Ultimately, there is also a question of national leadership. It is completely correct for one of Reconciliation Australia's main agendas to be undertaking a 'proactive role to encourage rigorous monitoring of Australian governments'. However, they have only moral persuasion and good will to achieve this goal. As discussed, my predecessor had argued about the implementation process for the Royal Commission, better results may have been achieved with a more active leadership role being played by the Commonwealth, including through the use of forms of leverage to ensure compliance such as performance conditions on grants to states and territories.

30 Howard, the Hon J, 'Address at the presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation', *op.cit.* p2.



The Commonwealth Grants Commission (CGC)'s *Report on Indigenous funding 2001* indicates how the federal government might exert such influence on the states, territories and non-government providers. Currently, approximately two-thirds of total Commonwealth expenditure on Indigenous housing, infrastructure and education is in the form of specific purpose payments (SPPs).³¹ Additional influence can be brought to bear on service delivery by the States through introducing and enforcing additional conditions for both mainstream and Indigenous-specific SPPs, such as data collection, mandating performance reporting, Indigenous-specific performance criteria and greater involvement in decision-making; and seeking extra conditions that target some of the expenditure of mainstream SPPs to aspects of the services that are important to Indigenous people.³²

The CGC Report also suggests that collaborative State level decision-making arrangements with Indigenous people could assist improved targeting and accountability regarding the expenditure of SPPs to meet Indigenous needs and, in doing so, assist a movement towards outcome-based conditions in SPPs.³³ These arrangements could facilitate greater Indigenous participation in decision-making processes, such as identifying need and setting priorities, at state, regional and local levels; provision of better sources of data and other information from local and regional levels for State level decision making; and greater responsibility for service provision and outcomes: for example, in relation to the expenditure of SPPs.³⁴

Clearly, this requires governmental commitment and control. Reconciliation Australia can not fulfil this role.

Reconciliation Australia also has limited ability to ensure adequate processes of monitoring and evaluation. They have no formal mandate to require governments to provide adequate information so that they may be held accountable and have their programs monitored and evaluated. The Council for Aboriginal Reconciliation also did not envisage that Reconciliation Australia would form the main measure for such evaluation. The proposed *Reconciliation Bill* contained a complex range of monitoring and evaluation mechanisms, from a National Reconciliation Convention every three years to be convened by ATSIC, a three yearly national progress report of government efforts to be completed by an independent taskforce, annual reporting by the Social Justice Commissioner and the establishment of a joint parliamentary committee on reconciliation which would consult widely about the reconciliation process, as well as evaluate the national progress reports and annual social justice commissioner report.

31 Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Commonwealth of Australia, Canberra, 2001, p65.

32 *ibid*, pxx.

33 *ibid*, p100. SPPs will become a smaller proportion of Commonwealth funding for states with the increase to general revenue grants under GST arrangements, which could provide an opportunity for re-assessment of SPP funding and identification of gaps in service delivery, or the creation of outcomes in new areas such as community capacity building.

34 *ibid*, pp98-9.



The government needs to ensure that responsibility for reconciliation is not, in effect, transferred to Reconciliation Australia. A centralised, coordinated approach to reconciliation is required at the national governmental level to ensure that reconciliation continues to grow.

4) *Practical reconciliation*

The central response to reconciliation over the past eighteen months has been the continuation of the government's commitment to a 'practical reconciliation' approach by addressing 'key priority' areas of disadvantage. As I also noted earlier in the chapter, this approach has continued independently of, and without reference to or assessment against, the recommendations of the Council for Aboriginal Reconciliation.

References to the inadequacy of practical reconciliation have been made throughout this report and in the *Social Justice Report 2000*.

In brief, the problem with this approach is the simplistic, arbitrary and extremely artificial division it creates between measures which are described as practical as opposed to symbolic. No such clear distinction exists – there is a clear inter-relationship between different issues and approaches which require multi-dimensional solutions. The focus solely on practical measures to address disadvantage within key priority areas is simply too narrow. It is also not accompanied with sufficient accountability for government performance – with inadequate monitoring and evaluation mechanisms, and a lack of sufficient benchmarks, targets and an insufficient basis of program delivery on outcomes. Similarly, it does not provide Indigenous people with a central role in determining priorities and it dismisses human rights as irrelevant.

Practical reconciliation's offer of equality to Indigenous peoples

Practical reconciliation seeks to address Indigenous people on a restrictive basis of equality. Ultimately it is assimilationist in approach, aiming for formal equality with only limited recognition of cultural difference. It seeks to maintain rather than transform the relationship of Indigenous people to the mainstream society.

The limited form of the equality offered by a practical reconciliation approach was exemplified by the government's response to the release of the final report of the Council for Aboriginal Reconciliation:

And whatever may be our different perspectives and the different views we might hold as to how to achieve our goals, I believe it can be said with total sincerity and total accuracy that there is, within the Australian community, a great deal of good will towards the indigenous people of our nation; a determination whatever our political perspectives may be to honour in a sensitive understanding way the special place that they will always occupy in the life of this nation and a determination to bring about those changes in the circumstances of their education, their health, their employment and their housing opportunities that will enable this country in the fullness of time to say that in relation to each of their citizens and to each of the groups that make up the Australian community that all are receiving a fair go; that all are sharing in the Australian dream and all are



in every sense of the word fully and equally part of the great Australian nation.³⁵

Equality as presented in this statement promotes equal opportunities for participation in the mainstream 'Australian dream' on the basis of sameness. As I observed last year, '[t]he failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society'.³⁶ A substantive equality approach would necessitate acknowledgement of the impact of historically-derived disadvantage on Indigenous peoples, and facilitate measures that are both culturally-appropriate and responsive to the inequity already experienced by Indigenous people.

Moreover, the terms of equal participation set out in this statement do not allow for recognition of the diversity and difference of Indigenous cultures, societies, values and traditions. The 'fair go' being offered is constrained to an offer to participate in the existing mainstream system, rather than an offer for that system to adapt or accommodate Indigenous cultural distinctiveness.

A position which appreciated the disadvantaged position of Aboriginal people and asserted their right to maintain their social and racial identity was fundamental to the Royal Commission into Aboriginal Deaths in Custody's original vision for the reconciliation process. This vision included recognition of the principle of self-determination:

The process of reconciliation, if it is to be successful, will, in my opinion, follow closely the principle of self-determination which, as I have said in this report, should be the guiding principle for all change in Aboriginal affairs. The principle provides a safeguard for Aboriginal people – by ensuring that the diversity of Aboriginal opinion is recognized – and at the same time imposes a restraint on Aboriginal leaders which they well appreciate.³⁷

The current offer of equal participation in the great Australian nation blurs the visions and perspectives of different citizen groups into one 'Australian dream', obscuring the need for specific recognition of Indigenous social and racial identity. In doing so, it closes down the dialogue between Indigenous and non-Indigenous peoples that was envisaged as an essential part of the reconciliation process. This dialogue was to be respectful of cultural difference while promoting co-existence:

... the non-Aboriginal society and culture is evolving and changing and the Aboriginal people must be allowed to develop their own culture in their own ways; clearly there is scope for the two to interact in a fruitful and mutually fulfilling way... And in the end, perhaps together, Aboriginal and non-Aboriginal, the situation can be reached where this ancient, subtly creative Aboriginal culture exists in friendship alongside the non-Aboriginal

35 See Howard, the Hon J, 'Address at the presentation of the Final Report to Federal Parliament by the Council for Aboriginal Reconciliation', *op.cit.*, pp2-3.

36 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit.*, p19.

37 Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 5*, AGPS Canberra 1991, paras 38.3, 38.26.



culture. Such an achievement would be a matter of pride not only for all Australians but for all humankind.³⁸

As the *Social Justice Report 2000* noted in relation to the response to the *Bringing them home* report:

Reconciliation cannot be imposed on one party by the other. It cannot be achieved when there is little or no consultation between the parties or when they adopt a 'take it or leave it' approach to the terms of their reconciliation. Participation on equal terms and the full agreement of both parties are essential to genuine reconciliation.³⁹

'Symbolic' issues

The lack of participation on equal terms is also evident in the dismissive approach of the government in refusing to address what it has termed the 'symbolic' aspects of reconciliation. The list of symbolic issues that fall outside the focus of the government on priority areas keeps growing. It includes issues such as an apology and reparations for those forcibly removed from their families, a treaty or the facilitation of agreement-making processes to deal with the unfinished business of reconciliation, and invariably almost any issue concerning human rights which does not meet with government approval.

One of the main concerns with this approach is that it clearly misconceives, or misrepresents, the purpose of a number of initiatives. Agreement-making processes and a treaty are not symbolic measures – they are about a fundamental realignment of the relationship between Indigenous people and the State. They are about ensuring the effective participation of Indigenous people in decision making processes in the broadest possible way rather than within boundaries imposed without negotiation.

In relation to a treaty, the government's response has been to express reservations about the possible divisiveness of a treaty: that it would create legal uncertainty and result in greater recourse to litigation (by both Indigenous and non-Indigenous parties). It instead promotes a focus on 'those things where we agree on reconciliation' – namely, the areas of the reconciliation documents and report in keeping with the Coalition's longstanding Indigenous policy focus on practical measures.

This is a 'take it or leave it approach' to reconciliation. The potential divisiveness of the treaty issue does not necessitate foreclosure of the debate, especially when it could be addressed constructively through the facilitation of a mechanism or process for ongoing discussion and negotiation of this issue.

ATSIC is currently engaged in facilitating a process for consulting with Aboriginal and Torres Strait Islander peoples by holding informal community meetings across the country. The aim of this process is to provide Indigenous people with information about the concept of a treaty, including the various types of treaties, with a view to holding more formal meetings or conventions that may result in a vote or plebiscite in the future. ATSIC is not negotiating a treaty; the

38 *ibid*, para 38.32.

39 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit*, p139.



ATSIC Board 'has recognised the need for broad Indigenous support and endorsement before any negotiations can occur'.⁴⁰ ATSIC has also established a National Treaty Support Group comprised of the ATSIC Chair, five commissioners and four community representatives to oversee the Board's treaty strategy and a national Treaty Think Tank which includes Indigenous intellectuals and activists, and 'has the role of stimulating debate and discussion and networking with regional and State/Territory think tanks'.⁴¹

Reconciliation Australia's strategic plan also supports public education and informed and objective debate across the community on the issues relating to a treaty or a framework agreement.⁴² Reconciliation Australia is currently developing a long-term project in partnership with the Gilbert and Tobin Centre of Public Law in the Faculty of Law at the University of New South Wales to provide information for the community to develop well-informed views on the issues involved.

Indigenous-specific expenditure in the federal budget

Practical reconciliation is backed up by a significant level of expenditure. The 2001-02 Budget includes 'Indigenous-specific spending' of \$2.39 billion – a record high level. In the Budget, the government announced 'its commitment to reconciliation and reducing Indigenous disadvantage through a boost of more than \$327 million to spending on Indigenous affairs'.⁴³

Out of an overall commitment to spend \$1.7 billion over four years on the 'Australians Working Together' welfare reform package, \$82.8 million was designated for 'Promoting self-reliance for Indigenous Australians'.⁴⁴ ATSIC funding, which represents 47 % of total Indigenous-specific funding in 2001-02, was 'increased by approximately 5 % since last financial year'.⁴⁵ The budget also provided, over a four year cycle, an additional \$75 million on housing and infrastructure; \$40 million on health; and \$54 million on stolen generations programs and initiatives; \$20 million from the Stronger Families and Communities Strategy for Indigenous community capacity building; \$11 million for Indigenous-specific initiatives under Partnerships Against Domestic Violence Strategy; and \$23 million through the Alcohol Education and Rehabilitation Foundation for Indigenous community-based projects to prevent alcohol and other substance abuse.

I welcome this expenditure and these initiatives. There are however a range of concerns about this approach.

40 ATSIC, *ATSIC Annual Report 2001-2001*, National Media and Marketing Office, ATSIC, Woden, ACT, 2001, p36. See also: www.treatynow.org.

41 *ibid.*

42 Reconciliation Australia, *op.cit.*, para 3.3.

43 Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, 'Budget promotes self reliance for Indigenous Australians', Media release, 22 May 2001, p1.

44 Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, 'A fair deal for Indigenous Australians', *Australians working together – Helping people to move forward, Fact Sheet 2*, pp1-2.

45 ATSIC, 'Fact Sheet: Summary of new ATSIC Specific Funding and Allocations', *ATSIC Budget Response*, 22 May 2001, p1.



The first is the emphasis that the government places on 'Indigenous-specific expenditure'. The definition of Indigenous-specific, for example, is extremely broad and includes everything from funding of the Federal Court and National Native Title Tribunal to process native title applications, funding for parties other than Indigenous people to native title matters (such as pastoralists) and to governments (generally to oppose native title applications), funding for programs of broad community benefit such as the National Museum of Australia and reconciliation, and so forth. In other words, it includes all expenditure that in some way relates to Indigenous people, regardless of the specificity of the relationship or the benefit that it provides (some of the funding identified as Indigenous-specific is clearly detrimental to Indigenous people's advancement).⁴⁶

The emphasis on specific programs also skews debate about Indigenous policy and reconciliation. As the *Social Justice Report 2000* noted, it is inappropriate to measure government progress in redressing Indigenous disadvantage in terms of expenditure on specific programs. The focus should instead be outcomes-based.

Specific or specialist programs are 'designed to compensate for the disadvantage and particular needs of Indigenous people – which stem from where they live, degree of poverty and particular aspects of their history or culture'.⁴⁷ But while Indigenous-specific programs are often strategic and targeted, they are not in position to replicate the level of services and expertise provided by mainstream programs, such as specialist hospital services.⁴⁸ One of the findings of the Commonwealth Grants Commission's *Report on Indigenous Funding* was that Indigenous-specific programs are being asked to do more than they were designed and funded to achieve because of the failure of mainstream programs to address Indigenous need effectively.

Accordingly, in response to the available evidence across all regions that mainstream services did not meet the needs of Indigenous people to the extent that they met non-Indigenous people's needs, the CGC Report identified equity of access for Indigenous people to mainstream services as the highest priority for government in reducing Indigenous disadvantage. It outlines the following three actions as most likely to guarantee equitable access:

- Ensuring all spheres of government recognise their responsibilities through mainstream programs, and the appropriate relationship between mainstream and Indigenous-specific programs;
- Reviewing all aspects of mainstream service delivery to ensure that they are sensitive to the special needs and requirements of Indigenous people; and
- Involving Indigenous people in the design and delivery of mainstream services.⁴⁹

46 See further: Jopson, D, 'Money that's black and white and spent all over', *Sydney Morning Herald*, 16 March 2001, p12.

47 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, *op.cit*, p92.

48 Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, *op.cit*, p91.

49 *ibid*, p92.



Ironically, some of these matters which are identified as the key to practical outcomes, are the same matters that lie at the core of processes such as a treaty – but which are dismissed as symbolic in other contexts.

A further concern is that expenditure on Indigenous-specific programs and initiatives announced in the 2001 budget falls short of the projected funding needs in a number of significant areas. The funding provided for housing and infrastructure is well below ATSIIC's estimates of current housing needs – ATSIIC Chair Geoff Clark observed on the budget's release that '\$75 million over four years 'will make little dent in the \$3 billion deficit in this area'.⁵⁰

While the budget allocates more than \$31 million over the next four years to assist CDEP workers in making the transition to labour market employment, the level of funding it provides for CDEP operational costs is not comparable with that for the WFTD scheme. The incremental increases to the health budget over 2001-2004 was criticised by the National Aboriginal Community Controlled Health Organisation (NACCHO) and the Australian Medical Association (AMA), with the AMA Conference calling for 'urgent changes in Indigenous health policy, included increasing funding by at least \$245 million a year, minimum benchmarks for service delivery and an "annual public report card"'.⁵¹

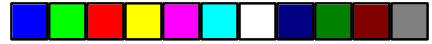
Of the \$86 million spending on native title, \$17.4 million will go to ATSIIC to assist the native title representative bodies and to establish a priority claims litigation program; the majority of funds will go to the National Native Title Tribunal and the Federal Court and will support the activities of those opposing native title claims as well as native title claimants. While the Federal Government has allocated \$11 million funding for Indigenous-specific family violence projects over a four-year period, issues remain surrounding the coordination of targeted funding and resources by a range of federal, state and territory departments and agencies with responsibilities for this area.

Despite the incremental increases in funding for Indigenous employment and housing needs, the failure to take into account the broader context of Indigenous disadvantage indicates that a more fundamental and far-reaching understanding of social justice and equity is lacking in Budget 2001's conception of a 'fair deal'. On its release, Budget 2001 received criticism from Indigenous leaders for being 'modest in the short term and disappointing for the long term', amounting 'to little more than a down payment on a future for Aboriginal and Torres Strait Islander peoples that never seems to come'.⁵² From a substantive equality perspective, the supplements to Indigenous-specific funding in Budget 2001 and the \$11 million for reconciliation projects present fairly slim pickings for Indigenous people, particularly in the absence of a long-term, nationally-coordinated framework with effective, negotiated outcomes. We are faced once again with the continuation of an approach that manages rather than seeks to overcome Indigenous disadvantage and marginalisation.

50 ATSIIC, 'A reconciliation budget?', ATSIIC News (Autumn 2001), p3.

51 *ibid.*

52 ATSIIC (Chairman), *ATSIIC - Budget Response, 2001 Budget: A mixed bag*, Media release, 22 May 2001.



5) *Domestic violence and abuse in Indigenous communities*

An issue that came to dominate national debate about Indigenous issues and reconciliation over the past eighteen months was that of domestic violence and abuse in Indigenous communities.

The focus on this issue has been used by the government to reinforce the practical reconciliation approach. The Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, for example, claimed that a long term benefit of the public debate about these issues was evidence that the 'public debate is finally beginning to catch up with the government's emphasis on practical assistance'.⁵³ The implication of his comments was that a focus on rights did not have the capacity to 'make a practical difference to people's lives'.⁵⁴ This is, however, an overly simplistic argument which disregards the history of government neglect of this issue.

Over a decade ago, the following observations were made about the lack of serious treatment of violence in Indigenous communities, especially that experienced by women and children:

In 1988, amid calls for a royal commission to investigate black deaths in prison cells and police watch houses, Aboriginal women argued that it was also important to consider the level of violent deaths of our people outside of these places. At that time we were concerned that while death in a watch-house received frenzied media attention, a suicide on the same day, in the same community, was viewed with no concern at all by the authorities. It was considered to be common place. More importantly, levels of violence towards women and children seem to be rising. A number of rapes of young girls cemented our concern that these were an expression of distress of people living in situations that Paul Wilson has described as 'violence provoking'.⁵⁵

An awareness of the prevalence of violence in Indigenous peoples' lives, particularly those of women and children, is not new and has been the subject of a series of reports. It has been, for example, a major policy focus of both ATSIC and the Office for the Status of Women for a number of years. In light of this, the history of a lack of adequate levels of response from government and other sectors of the community is profoundly disturbing.

Current approaches to address domestic violence and abuse in Indigenous communities

The main avenue for the Commonwealth's response to family violence issues has been its Partnerships Against Domestic Violence (PADV) scheme, which

53 Ruddock, the Hon P, 'Aborigines reach a turning point: the public is coming round to practical reconciliation based on individual responsibility', *Age*, 23 July 2001, p15.

54 *ibid.*

55 Atkinson, J, 'Violence against Aboriginal women: Reconstitution of community law – the way forward' (1990) 2(46) *Aboriginal Law Bulletin*, reprinted in (August-September 2001), 5 (11) *Indigenous Law Bulletin*, p19.



was launched in 1997 at the National Domestic Violence Summit.⁵⁶ The Federal Government allocated \$50 million over a four-year period (1999-2003) for PADV, which works with state and territory governments and the community to prevent domestic and family violence and includes \$6 million for the Indigenous Family Violence Grants Programme.

Last year, 30 Indigenous organisations from across Australia received funding of \$2.2 million for 31 projects addressing family violence. Three of these were funded through ATSIC, others through Commonwealth agencies, especially the Department of Family and Community Services. In addition, another \$5 million was spent under PADV on Indigenous initiatives for preventing and responding to family violence.

The National Domestic Violence Summit also recommended that COAG establish a National Task Force which would be supported by the Office for the Status of Women and report annually through the Commonwealth/State Ministers' Conference on the Status of Women to Heads of Government. In August 1999 MCATSIA endorsed a National Strategy on Indigenous Family Violence. Its Working Group on Family Violence established a set of principles for funding community-based organisations addressing family violence, which have been incorporated into the design of the National Indigenous Family Violence Grants Programme.⁵⁷

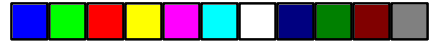
As the peak advisory body for Indigenous affairs, ATSIC provides another major avenue for Commonwealth funding of Indigenous family violence programs and policy advice in this area. ATSIC currently spends approximately \$4.5 million a year on a range of initiatives, including 12 family violence projects. These are located in rural and remote areas, and provide advice, counselling and support to women and children affected by violence. The projects also have a preventative focus, mainly through community education. ATSIC is also working on a national family policy in association with the Secretariat National Aboriginal and Islander Child Care.

During the media debate this year concerning Indigenous family violence, assertions were made, directly and indirectly, that ATSIC was wholly responsible for setting funding priorities for family violence strategies, and that it has failed to make Indigenous family violence a high priority on the national agenda as a consequence of a focus on rights at the expense of practical measures.

However, service delivery to Indigenous Australians is a shared responsibility between all levels of government: primary responsibility for issues of family violence rests with health and community service agencies in Federal, State and Territory governments. In addition, currently about 70 per cent of ATSIC's budget is quarantined by the Government for CDEP and housing and infrastructure, with the remaining discretionary funds to be spread across a wide range of social, cultural and economic programs, including family violence.

56 For example: 'It is not as if the recent reporting of domestic violence in indigenous communities is a complete revelation. The issue has been around for years, and the Federal Government has been doing a lot of work in this area. Unfortunately, many have chosen to ignore this.' Ruddock, the Hon P, 'Aborigines reach a turning point', *op.cit.*

57 See Commonwealth of Australia, *Working together against violence: The first three years of partnerships against domestic violence*, Office of the Status of Women, Canberra, August 2001, p57.



In 1991 ATSIC established a family violence intervention program in response to the National Committee on Violence report, *Violence: Directions for Australia*, which was funded through the Community and Youth Support Scheme. However, this program was terminated when the Community and Youth Support Scheme was abolished as a result of funding cuts of \$470 million over 4 years to ATSIC's budget introduced by the Coalition in 1996. ATSIC has since received \$1.3 million in the first PADV funding round to support two projects. When the government increased PADV funding by \$25 million in 1999, ATSIC expressed its support for the then Minister for Aboriginal and Torres Strait Islander Affairs to secure as much as possible of the available funds. However, ATSIC did not receive any increase to its funds for addressing family violence issues.

ATSIC's elected arm in Queensland also endorsed the *Indigenous Women's Task Force on Violence Report* in February 2000 and called on state and Federal Governments to match funds allocated already by Regional Councils, 'at the very least'.⁵⁸ Recently, ATSIC intervened to secure the continued operation of Apunipima Family Violence Advocacy Service on Cape York with an injection of funding until at least the end of the next financial year. This project was set up three years ago through stage one of the PADV program with part of the \$1.3 million Indigenous-specific funds which expired on 30 June 2001. As ATSIC Commissioner Pryor pointed out, 'This is the old story with pilot projects – what happens when the funding runs out?'⁵⁹

In addition to existing funds for this area, ATSIC's Board has agreed to allocate \$200,000 to fund a National Indigenous Working Group process, including a series of roundtable meetings, to address family violence. The Board also endorsed a leadership role for ATSIC in the National Strategy on Indigenous Family Violence 'by pursuing full membership status on relevant Federal and State task forces, working groups and committees established to combat family violence and sexual assault', and emphasised the need for increased government funding to combat family violence, to expand the number of services and to increase funding to existing services. A subsequent Indigenous Women's Roundtable meeting 'endorsed a holistic approach, a national framework for changing the intergovernmental arrangements for dealing with violence, and linking ATSIC's Family Policy and Violence Strategy with the roundtable process'.⁶⁰

Further outcomes from roundtable meetings include agreement: to establish a combined men and women's National Indigenous Family Violence Working Group; to seek government funding to support ATSIC's family policy; and to establish a National Family Violence Secretariat.⁶¹

ATSIC's National Indigenous Women's Forum and Roundtable process, and its emphasis on direct community involvement and collaboration with

58 Pryor, J, 'Whose cover up?', *ATSIC News* (Spring 2001), p16. For example, Goolburri Regional Council allocated \$200,000 for domestic violence and trauma counselling across southern Queensland but has had no response from state and Federal Governments. See Button, B, 'Family violence not such a priority for governments', *ATSIC media release*, 2 July 2001.

59 *ibid.*

60 ATSIC, 'Indigenous Women's Roundtable achieves results', Media release, 13 September 2001, p1.

61 ATSIC, 'Indigenous roundtable seeks partnership', Media release, 30 October 2001.



government to find solutions for family violence issues have been commended by relevant government ministers.⁶² Calls have also been made by ATSIC, Reconciliation Australia and the federal Minister and Parliamentary Secretary for Reconciliation and Aboriginal and Torres Strait Islander Affairs for re-assessment of national coordination of this issue.

On 28 July 2000 MCATSIA was addressed for the first time by an Indigenous delegation, which consisted of representatives from the ATSIC Indigenous Women's Roundtable, who called for 'a holistic and strategic long term response to family violence to empower Indigenous women, men and children to deal with the complex issues involved rather than a quick fix approach based on the current proliferation of Government funded pilot schemes'.⁶³ MCATSIA agreed to an audit of existing Indigenous family violence strategies, and to a seven-point strategy comprised of reducing alcohol and substance abuse; child safety and well-being; building community capacity (including cultural strength); improving the justice system; creating safe places in communities; improving relationships (focusing on perpetrators and those at risk of offending); and promoting shared leadership.

The Council also endorsed ATSIC's establishment of a National Indigenous Women's Forum to provide a national voice for Indigenous people on violence by communicating with local Indigenous networks on culturally-appropriate initiatives, as well as the facilitation of Indigenous women and men's roundtables on the issue, which are to report back to MCATSIA. However, in addition to the Federal Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs and his Parliamentary Secretary, the meeting was only attended by three State ministers (from Western Australia, Queensland and Victoria) and Deputy ATSIC Chair.⁶⁴ ATSIC noted its disappointment at the non-attendance of so many state and territory ministers and at the lack of any proposals for new targeted funding or resources.⁶⁵ A press release issued by the Federal Minister recorded that: 'the question of providing additional funding was raised at the meeting, and I indicated that I was prepared to pursue this at the Commonwealth level but unfortunately state ministers were not prepared to do the same'.⁶⁶

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- 62 Parliamentary Secretary on Aboriginal and Torres Strait Islander Affairs, 'Indigenous Women's Roundtable a crucial step forward', Media release, 13 September 2001; Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs and Parliamentary Secretary on Aboriginal and Torres Strait Islander Affairs, 'Agreement on Indigenous family violence welcomed', Media release, 28 July 2000, p1; Minister for Aboriginal and Torres Strait Islander Affairs and Minister for Family and Community Services, '\$2.2 million for indigenous communities to design solutions to family violence', Joint media release, 14 August 2000, p2.
- 63 ATSIC (Commissioner Anderson and Deputy Chair Robinson), 'Action on family violence', Media release, 29 July 2001, p1.
- 64 NSW Minister Refshauge refused to attend on the basis that the Federal Minister for Family and Community Services wouldn't be there: 'Time and again we have had Aboriginal affairs ministers' meetings noting things, but nothing happened because no Federal line agency is represented': ATSIC, 'No more silence', *ATSIC News*, Spring 2001, p14.
- 65 ATSIC (Commissioner Anderson and Deputy Chair Robinson), *Action on family violence*, Media release, 29 July 2001, p2.
- 66 Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs and Parliamentary Secretary on Aboriginal and Torres Strait Islander Affairs, 'Agreement on Indigenous family violence welcomed', *op.cit.*, p2.



On 6 August 2000 Reconciliation Australia repeated their 26 June call for a concerted national approach to Indigenous family violence, saying that they 'feared Australia would fail the "reconciliation test" on domestic violence in Indigenous communities unless Heads of Government ensured a concerted and comprehensive national effort on the issue'.⁶⁷ They criticised the outcomes of the MCATSIA meeting since they 'did not demonstrate that a coherent national strategy is being progressed in tangible ways' and questioned MCATSIA's authority to instigate change in this area, given that many departments and agencies responsible for the issue are not under the control of MCATSIA.

They also called for the issue to be dealt with through COAG, because 'many departments and agencies at Federal, State and Territory levels are relevant to this issue, and they are not under the control of Ministers for Aboriginal and Torres Strait Islander Affairs'.⁶⁸ Their 26 June media release had noted COAG's commitment to addressing family violence as part of its review of service delivery arrangements, and announced Reconciliation Australia's readiness to work in partnership with all relevant parties 'to achieve the most appropriate and adequately-resourced national response to these pressing issues and to monitor progress'.⁶⁹

While calls for a nationally-coordinated response to Indigenous family violence have received some support, such as MCATSIA's commitment to a 7-point action plan, there is clearly a need for further commitments to be made to drive a whole-of-government approach across all relevant Commonwealth, state and territory agencies and departments, including appropriate responses to requests for additional funding and services. As ATSIC's Annual Report 2000-2001 observes:

The feeble national response to this family violence strategy provides yet more evidence of the defects of Australia's federal system in relation to Indigenous Australians. As numerous recent UN reports have pointed out, the Commonwealth is accountable for the commitments Australia has made under various international human rights instruments. This accountability extends to the record of the States and Territories⁷⁰...

Reconciliation Australia has stressed that the recent focus on Indigenous family violence provides COAG with an opportunity to make good its November 2000 commitment to evaluating measures for tackling family violence and other symptoms of community dysfunction. As part of its national leadership and coordination role, COAG should link the achievement of effective outcomes in this areas to a long-term investment in building Indigenous capacity that is responsive to the rights of Indigenous peoples to family and culture, including the role which women play in sustaining families and communities and the future part of younger people in community participation and leadership. Similar commitments should also be made across other sectors of the community.

67 Reconciliation Australia, 'Heads of Government should ensure concerted national action on domestic violence in Indigenous communities – Co-Chairs', Media release, 6 August 2001.

68 *ibid.*

69 Reconciliation Australia, 'The reconciliation test: will current debate lead to a concerted effort to address family violence in Indigenous communities?', Media release, 26 June 2001, p2.

70 ATSIC, *Annual Report 2000-2001*, *op.cit.*, p45.



The need for an holistic rights-based approach to Indigenous family violence

Indigenous representatives have articulated a number of common elements for achieving effective outcomes in response to family violence issues. These include the need for national coordination of a holistic and strategic long-term strategy rather than quick-fix, short-term solutions, and to ground policy on Indigenous family violence in self-determination and cultural rights.

This stands in contrast to the Federal Government's claim that the renewed focus on family violence has led to a 'turning point' for Indigenous people in which they have recognised the need to eschew a rights-agenda and accept a practical reconciliation approach.

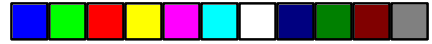
The government's current provision of practical assistance through measures such as the Aboriginal and Torres Strait Islander Substance Misuse Strategy, the Stronger Families and Communities Strategy, and the Alcohol Education and Rehabilitation Foundation in addition to PADV funding seeks to target specific areas such as chronic levels of substance and alcohol abuse which often relate to high levels of violence. This represents a piecemeal rather than a consolidated effort to address the symptoms of the loss of individual, family and community cohesion and well-being. One of the dangers present in isolating and targeting issues such as alcohol or substance abuse, or family violence is the perpetuation of a crisis-funding approach that focuses on short-term gains but fails to set in place long-term, integrated strategies that will bring about genuine change, as demonstrated by the near-collapse of the Apunipima Family Violence Advocacy Service.

In part this is a reflex of the short-term funding arrangements that characterise Indigenous affairs, and in ATSIC's case the imposition of accountability requirements that limit the time-frame for successful implementation of strategies and the discretion to determine available levels of funding for different programs. Longer time-frames for funding projects and the discretion to determine funding levels would provide greater opportunity to implement projects that could target the long-term effects of issues such family violence.

In their media responses to Indigenous family violence, both ATSIC and the Federal Government mention the expenditure across a broad range of Indigenous programs such as health, housing and employment as a significant, if indirect, contribution to redressing the underlying causes of family and community dysfunction.⁷¹ However, as discussed above, a more far-reaching, nationally-coordinated response that seeks to identify gaps in existing funding and services is needed. It is simply not enough to tout an injection of funds into a handful of strategies as signs of an effective and practical approach to serious issues which are the product of long-term dispossession and community disintegration and which will take a long time to reverse.

This response needs to go beyond the identification of best practice examples recommended as part of the national audit of Indigenous family violence strategies to the identification of outcomes that will empower Indigenous people

⁷¹ Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs and Parliamentary Secretary on Aboriginal and Torres Strait Islander Affairs, 'Agreement on Indigenous family violence welcomed', *op.cit*, p2.



and support their aspirations. Far from establishing the irrelevance of so-called symbolic measures and the need for an emphasis on individual self-reliance, the renewed focus on family violence issues has highlighted the need for recognition of Indigenous cultural values and traditions.

ATSIC's Indigenous Women's Roundtable meeting endorsed a rights-based family policy to drive its national strategy for addressing family violence. This policy upholds the distinct cultural characteristics of Indigenous families in accordance with the right to self-determination; the importance of traditional authority structures and the role each family plays within community; and the need to redress those issues with a detrimental effect on families, communities and cultures through strategies related to women, men, children, youth, elders and people with a disability.⁷² The policy also notes the powerful role that could be played by a symbolic measure such as a formal apology,

... which acknowledges that past governments violated our inherent right to express and enjoy our right to family. Recognition in this way will enable us to reconnect, rebuild and restore our traditional family unit as the primary source for nurturing and protecting us in our cultural heritage and general wellbeing.⁷³

The renewed emphasis of governments on violence and abuse in Indigenous communities is long overdue and welcomed. The use of this issue to reinforce the practical reconciliation approach is not. It operates to foreclose debate about significant issues of reconciliation.

6) *Human rights and reconciliation*

No aspects of the Council for Aboriginal Reconciliation's proposals on Indigenous rights have been implemented by the government.

Chapter 2 of this report was critical of the way that the government has adopted, and misrepresented, Noel Pearson's arguments about reciprocity and responsibility to justify this approach. In particular, the government incorrectly take concerns expressed by Noel Pearson about rights to justify a position where rights are not respected.

There is a distinction to be made between two types of rights of application to Indigenous people.⁷⁴ There are those rights that every Australian is entitled, including Indigenous people, commonly referred to as citizenship rights; and those that recognise and protect Indigenous culture and which are inherent to Indigenous people.

As I state in my *Native Title Report 2001*:

This important distinction has not been made in the government's recent and generalised attack upon a rights approach as inadequate to deal with, if not causally related to, the high levels of violence perpetrated by Indigenous people against their own families and communities.

72 ATSIC (Chair), 'National Indigenous group on domestic violence', Media release, 22 August 2001.

73 ATSIC, 'Our rights: our lives: our way', *op.cit.*, p10.

74 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, HREOC Sydney 1999, Chapter 3 – Identity rights.



The government has condemned the rights approach as symbolic only, one which doesn't produce practical results.⁷⁵ Symbolic rights are distinguished from practical outcomes. Practical outcomes result from dealing with Indigenous issues on an individualistic basis.

It appears from a close analysis of the arguments opposing a rights approach to Indigenous issues that it fails to distinguish between the two types of rights relevant to Indigenous peoples; citizenship rights and inherent rights. What are actually being attacked as the cause of the horrendous and irresponsible violence in some Indigenous communities are the rights that came with citizenship. That is, the right of Aboriginals to be treated the same as non-Aboriginals, without being discriminated against on the basis of their race. The right to leave a mission or reserve without first seeking permission. The right to vote. The right to enter a pub and buy alcohol. The right to unemployment benefits when out of work. The right to enter a de facto relationship. The right to formal equality.

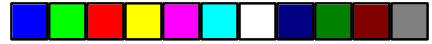
Yet of those attacking the rights approach as producing no improvement in Aboriginal lives, no one has suggested that the solution is to take these rights away and force Aboriginal people back to the mission or the reserve under the supervision of the Crown, the police or the church. To do so would strike at the very core of Australian society as well as marginalise Aboriginal communities and their problems even more than is presently the case. These rights do not need to be abandoned, they need to be augmented. The real problem with citizenship rights... is that they are not capable of transforming the poverty and destitution that marks so many Aboriginal people's lives. They were not intended for this purpose.

Formal equality on its own is not enough. As a tool of social change it is inadequate and, indeed, entrenches the inequality that already exists. To that extent I agree with the critics of a rights approach to Indigenous disadvantage and poverty. What I don't agree with is their conclusion that, as an approach to social policy, rights are incapable of addressing these Indigenous issues.

The problem is not that Aboriginal people were given equal rights and treated like everyone else. The problem is that these are the only rights that Aboriginal people were given. This type of equality, formal equality, is not enough to restore Aboriginal people to their rightful place as the first peoples of this country. We need to go further with rights. We need to adopt a rights approach that does have the capacity to transform social, economic and political relations in Australia. I have, in my previous annual reports advocated two types of measures, based on rights, which have this capacity. First, measures known as special measures, aimed at achieving equality, rather than assuming it; and second, the full recognition of Indigenous people's inherent rights, in particular native title.

A combined approach, utilising these two types of rights, has not been adopted by any government as a way of addressing the disadvantage it is designed to transform. When an opportunity did arise to recognise inherent rights through native title it was immediately encased in a legal armature that gave it no room to deliver real outcomes. Its capacity to provide economic opportunities for Indigenous people, to provide equal respect for Indigenous culture, to provide governance structures for Aboriginal communities has been severely limited through the NTA and

75 Ruddock, The Hon P, 'Aborigines reach a turning point', *The Age*, 23 July 2001.



the common law. The proposal to implement special measures to overcome the destructive cultural, social and economic impact of dispossession with the full participation and consent of Indigenous people through the *Social Justice Package* was never pursued by any government.

The call to abandon rights assumes that they have been tried and failed. That is incorrect. Indigenous rights, ones that recognise Aboriginal people for what they are, and have the capacity to change their dire living circumstances, have never been embraced as a way forward. What is required is that Aboriginal people be given the full enjoyment of their inherent rights through native title and that Indigenous disadvantage be addressed with the full participation of those affected.⁷⁶

Recommendations on reconciliation

There is an urgent need for the federal government to commit, in meaningful terms, to the recommendations of the Council for Aboriginal Reconciliation. This is not the same as generalised statements of commitment to reconciliation – such statements are cheap and do not hold government's accountable.

Due to concerns about the lack of response to the Council for Aboriginal Reconciliation's documents of reconciliation and final report, as well as the inadequate response to the *Social Justice Report 2000*, I have chosen to make the following recommendations in accordance with s46C(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986*. The first relates to the urgent need for a national response and plan of action to sustain reconciliation into the future. The second reflects provisions of the Council for Aboriginal Reconciliation's *Reconciliation Bill* which relate to monitoring and evaluation mechanisms for the *Social Justice Report*.⁷⁷

Recommendations on reconciliation

Recommendation 11: The Senate empower the Legal and Constitutional References Committee to conduct an inquiry into the implementation and response to the reconciliation process. The terms of reference of the inquiry should require the Committee to examine the recommendations contained within the *Roadmap to Reconciliation*, the final report of the Council for Aboriginal Reconciliation and the *Social Justice Report 2000* as well as the adequacy of the response of the Federal Government to each of these. In determining the adequacy of the response, the Committee should be required to consider processes by which government agencies have reviewed their policies and programs against the documents of reconciliation; as well as the adequacy of targets and benchmarks adopted and monitoring and evaluation mechanisms.

76 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, HREOC Sydney 2001, Chapter 1.

77 See further, *Draft Reconciliation Bill 2000*, section 15(c) in Council for Aboriginal Reconciliation, *Australia's Challenge*, CAR Canberra 2000, p173.



Recommendation 12: At the time of tabling of the annual Social Justice Report in Parliament, or within 15 sitting days, the Government furnish a response to the report and its recommendations in Parliament. In the event that the Government does not furnish such a response in Parliament, the Senate consider the establishment of a parliamentary inquiry to consider matters that appear in or arise out of the report and its recommendations, and matters to which the Committee believes Parliament's attention should be directed.

Conclusion – Stopping the unstoppable?

This chapter has raised a number of significant concerns about the approach of the federal government to reconciliation in the eighteen months since the release of the documents of reconciliation, and in the twelve months since the end of the Council for Aboriginal Reconciliation. As the Council for Aboriginal Reconciliation noted:

[T]rue and lasting reconciliation is not a foregone conclusion. Reconciliation is hard work – it's a long, winding and corrugated road, not a broad, paved highway. Determination and effort at all levels of government and in all sections of the community will be essential to make reconciliation a reality.⁷⁸

True and meaningful reconciliation is being prevented as long as the only attempt being made to accommodate Indigenous peoples within the fabric of Australian society is on the basis of sameness, without recognition of cultural distinctions. The lack of leadership demonstrated by the federal government leaves reconciliation without focus and without cohesion. As important as the people's movement for reconciliation is, it will surely dissipate if not accompanied by real commitments to real outcomes by governments.

In concluding this chapter and this report, I return to the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission laid out the essential parameters of reconciliation, so that it would be meaningful in addressing the situation of Indigenous involvement in criminal justice processes. The national report emphasised that joint recognition of Indigenous peoples' right to self-determination and the need to redress Indigenous disadvantage were intrinsic to the success of the reconciliation process. Commissioner Johnstone wrote:

If it is recognized that the cause of distrust and disunity is the historical experience of Aboriginal people and their continuing disadvantage, then, plainly, good community relations cannot be achieved without the elimination of the disadvantage and the recognition of Aboriginal rights, Aboriginal culture and traditions. There must be a complete rejection of concepts of superiority and inferiority...

I believe that it can be demonstrated that where, over the last twenty-five years, there has been an improvement in community relations it is invariably associated with a genuine effort to reduce disadvantage and to do so by dealing with Aboriginal people in a way which respects their position. Furthermore, if the broader society does give tangible and on-

78 Council for Aboriginal Reconciliation, *Australia's Challenge*, CAR Canberra 2000, p101.

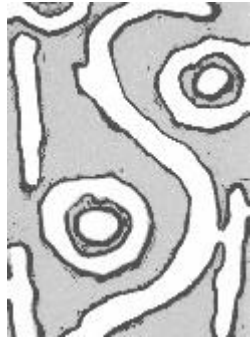


going proof of such efforts in a way which recognizes the principle of self-determination it can, I think, be said with much confidence that there will be substantial improvements in relations between Aboriginal and non-Aboriginal.⁷⁹

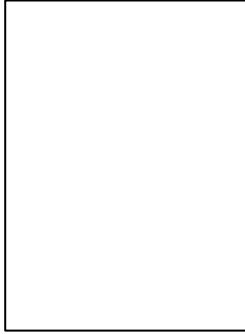
Recent years have seen the emphasis of the reconciliation process shift dramatically. Currently, it is not about mutual accommodation on the basis of equality – it is about whether one group, Indigenous people, are prepared to conform to the rest of society. If not, then the offer is closed.

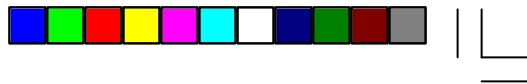
⁷⁹ Royal Commission into Aboriginal Deaths in Custody, *National Report – Volume 5*, AGPS Canberra 1991, para 38.3.

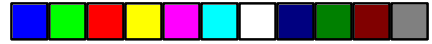




Appendices







Appendix 1



Juvenile diversionary schemes in Australia and New Zealand

This appendix provides a brief overview of juvenile diversionary schemes, including their legislative or administrative basis, in Australian jurisdictions and New Zealand.¹ It complements the more detailed overviews provided of the Northern Territory and Western Australian schemes in chapter 5 of this report.

New Zealand

The *Children, Young Persons and Their Families Act 1989* (NZ) pioneered the formal implementation of restorative justice in Australasia. One of the general objects of the Act is:

Ensuring that where children or young persons commit offences (i) they are held accountable, and encouraged to accept responsibility, for their behaviour and (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in a responsible, beneficial and socially acceptable way.²

The legislation includes both youth justice and child welfare concerns whereas in Australia the focus is almost entirely on youth justice.³ According to Strang, after more than a decade of experience with juveniles, conferencing programs in New Zealand are being extended to adults.⁴

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- 1 For more detailed overviews of the Australian jurisdictions see Strang, H, *Restorative Justice Programs in Australia – A Report to the Criminology Research Council*, March 2001; Daly, K, 'Conferencing in Australia and New Zealand: Variations, research Findings, and Prospects' in Morris, A, & Maxwell, G (eds), *Restoring Justice for Juveniles: Conferencing, Mediation and Circles*, Oxford, Hart Publishing, 2001, pp59-83; Bargen, J, 'Kids, cops, courts, conferencing and children's rights – a note on perspectives' in Jones, M & Basser Marks, L (eds), *Children on the agenda – the rights of Australia's children*, Prospect Publishing, Sydney, 2001.
 - 2 *Children, Young Persons and Their Families Act 1989* (NZ) s4(f).
 - 3 Daly, K, *op.cit*, p68.
 - 4 Strang, H, *op.cit*, p4.



The Act provides for warnings and more formal cautions for young persons who admit to the offence.⁵ This is similar to all Australian diversionary schemes. However, unlike many other jurisdictions, evidence of warnings and cautions cannot be disclosed to a court in subsequent proceedings, except by the defence.⁶

All offences other than minor offences are referred by police to Youth Justice Coordinators, who are employed by the Department of Social Welfare to convene Family Group Conferences (FGCs).

There are two routes to an FGC: either a direct referral from a Youth Justice Coordinator or, after charges have been laid, a referral from the Youth Court. Only the more serious offences can be dealt with by FGCs. The key feature of the system of conferencing is that police do not organise the conferences and their role is quite circumscribed. Conferences are facilitated by Youth Justice Coordinators and include the young person, the extended family, the police informant, the victim or a representative and a lawyer or advocate for the young person.⁷ The procedure at a conference is regulated by the participants.⁸ Agreements must be unanimous.⁹ Generally, conferences cannot proceed unless the participants are satisfied that the young person admits the offence.¹⁰

Another feature of FGCs is that they can have a range of purposes and can be held at various stages of the criminal justice process, including before a charge is laid, while a young person is on remand or once the offence has been admitted by the young person or proven in court.¹¹

Notably, the New Zealand system emerged from a political process that involved both state officials and professional workers at 'the top' and Maori groups from the 'bottom up'.¹² It was a Maori challenge to white New Zealanders to invest decision-making practices with Maori cultural values, meaning that families should have a greater say in what happens and that venues and processes should be culturally appropriate.¹³ As Strang notes, 'The intention was to provide a forum for those most affected by the offence, rather than the state, to resolve the conflict'.¹⁴

While the general consensus is that the Act allows for culturally sensitive implementation to occur, there have been criticisms that ignorance of the Act, a

5 *Children, Young Persons and Their Families Act 1989* (NZ) ss209-210. A statement by a child is only admissible in evidence if it is made in the presence of an independent adult such as a parent or lawyer. The child must be given the opportunity to obtain legal advice: *Children, Young Persons and Their Families Act 1989* (NZ) ss221(2)(c), (b), 227(3). Formal cautions are also available if a child is found guilty at court.

6 *Children, Young Persons and Their Families Act 1989* (NZ) s213.

7 *Children, Young Persons and Their Families Act 1989* (NZ) s251. Others, such as social workers, may be present in appropriate circumstances.

8 *Children, Young Persons and Their Families Act 1989* (NZ) s256.

9 *Children, Young Persons and Their Families Act 1989* (NZ) s264.

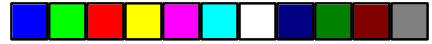
10 *Children, Young Persons and Their Families Act 1989* (NZ) s259.

11 *Children, Young Persons and Their Families Act 1989* (NZ) s258. Section 260 governs the types of recommendations that a conference can make.

12 Daly, K, *op.cit*, p61.

13 Daly, K, *op.cit*, p65.

14 Strang, H, *op.cit*, p4.



death of resources and mismanagement have led to some examples of inappropriate processes taking place for Maori offenders.¹⁵

New South Wales

In 1991, a pilot of police-run victim/offender conferencing started in Wagga Wagga, a large regional centre in south-west New South Wales. The pilot prompted considerable debate and negative comment, chiefly due to the level of police involvement.¹⁶ In 1994, the Wagga pilot was replaced with a pilot of community youth conferencing in six districts including Wagga. Conferences were run by co-ordinators trained by Community Justice Centres.¹⁷

The current system came into force with the introduction of the *Young Offenders Act 1997* (NSW). The Act formalises a statutory hierarchy of warnings, cautions and youth justice conferences for diverting young people from the formal justice system. The Act includes a high degree of detail on eligibility criteria and procedural safeguards at each level of diversion. The Act also emphasises children's rights, drawing on principles in the Convention on the Rights of the Child (CROC).

Under the Act, a child must admit the offence to be eligible for a caution or a youth justice conference.¹⁸ An admission is only valid if it takes place in the presence of a person responsible for the child. If the police officer decides not to proceed against a young person by way of warning or caution, the case must be referred to a specialist youth officer within the police force.¹⁹ The specialist youth officer then decides whether a youth justice conference is an appropriate diversion based on criteria set out in the legislation.²⁰

Before referring a matter to conference, a specialist youth officer must tell the young person that s/he is entitled to obtain legal advice and where that advice can be obtained.²¹ In practice, this usually means referring the young person to the Legal Aid Youth Hotline which is staffed by solicitors working in the NSW Children's Court.²²

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- 15 Bargaen, J, *op.cit*, p167, citing research by Maxwell, G & Morris, A, 'The New Zealand model of family group conferences' in Alder, C & Wundersitz, J (eds), *Family Conferencing and Juvenile Justice: the Way Forward or Misplaced Optimism?*, Australian Institute of Criminology, 1994.
- 16 See Blagg, H, & Wilkie, M, *op.cit*, p64. This is often referred to as the 'Wagga model' of conferencing.
- 17 Some coordinators were police and some were civilians. Community Justice Centres are part of the Attorney-General's portfolio and employ mediators who assist to resolve neighbourhood and family disputes.
- 18 *Young Offenders Act 1997* (NSW) ss10, 19, 25.
- 19 *Young Offenders Act 1997* (NSW) ss14(4), (2). Specialist youth officers are appointed by the Police Commissioner for each local area command. They work with the youth liaison officers who are attached to most police stations.
- 20 *Young Offenders Act 1997* (NSW) s37(3). Referrals to youth justice conferences can also be made by the Children's Court after an admission or a finding of guilt. At the end of the first year, half of the referrals had come from the police. Strang, H, *op.cit*, p8.
- 21 *Young Offenders Act 1997* (NSW) s39(1)(b).
- 22 The Hotline is open 9am to 12 midnight on business days and 12 noon to 12 midnight on other days. It was established as a direct response to the increased need for pre-court legal advice once the *Young Offenders Act 1997* (NSW) commenced operation.



Youth justice conferences are facilitated by conference convenors working for the Department of Juvenile Justice on a contractual basis.²³ There are approximately 480 community-based convenors throughout the state, a number of them Indigenous.²⁴ Victims must be invited to the conference but it can be held without them.²⁵ Only the young person and the victim have right of veto over the outcome plans of the conference.

Outcomes from youth justice conferences cannot be more severe than a court would impose for such an offence.²⁶ Many outcome plans have to date provided innovative modes of reparation. For example, three Aboriginal boys attended a youth justice conference for a series of property offences. As part of the outcome plan, they spent several weeks painting a mural at a youth centre under the guidance of a teacher of Aboriginal art and were able to learn more about their culture.²⁷

In 2000, an evaluation of conferencing in NSW was published by the Bureau of Crime Statistics and Research. The evaluation found that a very high proportion of the survey respondents were satisfied with both the preparation for the conference, the way the conference was conducted and their role in the conference.²⁸

Despite the progressive model of conferencing adopted in NSW, statistics suggest that Indigenous young people still do not get the benefit of diversion at the same rate as non-Indigenous young people. A recent review found that, whereas the overall rate of diversion (including cautioning and conferencing) was around 37 per cent, the rate for indigenous youth specifically was lower, at just over 24 per cent.²⁹

A two-year pilot of young adult (18-24 years) conferencing is soon to commence in NSW.

South Australia

The *Young Offenders Act 1993 (SA)* provides for informal cautions, formal cautions, family conferences and the Youth Court.

23 *Young Offenders Act 1997 (NSW)* ss61, 42, 59, 41. They are not appointed as part of the *Public Sector Management Act 1998 (NSW)*.

24 Strang, H, *op.cit*, p8.

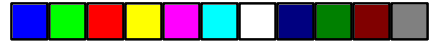
25 *Young Offenders Act 1997 (NSW)* s52(4).

26 *Young Offenders Act 1997 (NSW)* s52(6)(a).

27 Correspondence with Youth Justice Conferencing Administrator, 15 August 2001.

28 Trimboli, L, *An Evaluation of the NSW Youth Justice Conferencing Scheme*, NSW Bureau of Crime Statistics, Sydney, 2000, pp64-65. There is also a statutory requirement on the Minister for Juvenile Justice to review the *Young Offenders 1997 (NSW)* three years after commencement to determine whether its policy objectives remain valid and whether its 'terms remain suitable for securing those objectives': *Young Offenders Act 1997 (NSW)* s76. The review is being conducted collaboratively by the Department of Juvenile Justice, the University of NSW and the Aboriginal Justice Advisory Council.

29 Hennessey, N, *Review of the gatekeeping role in the Young Offenders Act, 1997 (NSW)*, a report to the Youth Justice Advisory Council of New South Wales, 1999. Conference referral rates alone were only slightly lower for Indigenous young people (3.08 per cent) than non-Indigenous (3.36 per cent). The New South Wales Law Reform Commission found the lower rates of diversion – using the New Zealand experience as a base-line – lower than expected. The New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Sydney, 2000.



No offences are specifically excluded from the system by the legislation or the regulations. In the case of formal cautions and family conferences, but not informal cautions, an admission must be written and should be signed by the young person 'if possible', in the presence of a guardian. Referrals are by consent of the young person and can only be made once he or she has been given an opportunity to obtain legal advice.³⁰

Formal cautions are administered by the police officer and may require an apology or other conditions.³¹ Victims have the right to be informed of the identity of the young person and of the way the matter has been dealt with but are not present at the caution.³²

South Australia was the first State or Territory to establish a statutorily-based youth conference scheme based largely on the New Zealand model. Family conferences are facilitated by Youth Justice Coordinators who are either magistrates or those appointed to the position on a contractual basis.³³ Participants include the young person and support people, the victim and support people, a police representative and any other people whom the police informant considers it appropriate to invite.³⁴ Decisions should be made by consensus if possible but only the agreement of the young person and police representative is needed to validate them. The young person is entitled to be advised by a legal practitioner at the conference.³⁵

The Act does not list what offences are covered by the diversion provisions. This has been determined instead by police practice. The South Australian Police General Order 8980 (1998) provides that a conference can be held for any offence for which the young person has already been cautioned, any offence resulting in property loss between \$5000 and \$25,000 and any other offences considered appropriate by the informant. During the eight years of the legislation's operation some serious offences have been dealt with through conferencing, including robbery and sexual assault (where both victim and offender were under eighteen).³⁶ Police hold the discretionary power to refer offenders to conferences. The Youth Court does not refer to family conferences. In 1996 a comprehensive process evaluation of the scheme was completed, which concentrated on successful conferences.³⁷ It found that a much higher proportion of Aboriginal offenders did not attend or did not agree to the outcome of conferences. The program is currently being re-evaluated.³⁸

30 *Young Offenders Act 1993* (SA) s7(2)(a), (b).

31 *Young Offenders Act 1993* (SA) s8(1). Undertakings have a maximum duration of 3 months: s8(6)(b). When administering a formal caution, the informant must 'have regard to sentences imposed for comparable offences by the Court': s8(4)(a).

32 *Young Offenders Act 1993* (SA) s8(9).

33 *Young Offenders Act 1993* (SA) s9. Conferencing is administered by the Department of Courts Administration. Magistrates generally act as co-ordinators when other co-ordinators are not available: Bargen, J, 'Kids, Cops, Conferencing and Children's Rights', *Australian Journal of Human Rights*, (1996), 2(2), pp209, 216.

34 *Young Offenders Act 1993* (SA) ss10, 11.

35 *Young Offenders Act 1993* (SA) ss11(2), (5).

36 Strang, H, *op.cit*, p13.

37 Wundersitz, J, *The South Australian Juvenile Justice System: A Review of its Operation*, Office of Crime Statistics, SA Attorney-General's Department, Adelaide, 1996.

38 Daly, K, *op.cit*, p74.



Victoria

Victoria is the only Australian state not to have a legislatively based juvenile diversion scheme. There is no provision for police or court cautions under the *Children's and Young Persons' Act 1989 (Vic)* but there is a long established practice of using them. Victim/offender conferences are only available as post-court diversion by way of a sentencing option.

However, since 1995 a Juvenile Justice Group Conferencing Program administered by the Mission of St James and St John has been operating from Melbourne Children's Court.³⁹ Young people who admit the offence and who would be likely to be sentenced to a supervisory order by the court are eligible. The Program is aimed at more serious matters and offenders who are considered at risk of progressing through the justice system. The case is adjourned while the conference is being convened.

Participants in a juvenile justice group conference include the young person and family, the police, relevant community members and legal representatives. The victim can attend in person or send a representative but the conference can proceed without them.⁴⁰ An evaluation of the scheme's operation demonstrated positive feedback from all participants.⁴¹

Queensland

The *Juvenile Justice Act 1992 (Qld)* includes two diversionary options: police cautions and community conferences. Any officer can caution a young person for an offence provided the young person admits the offence and consents to being cautioned. Cautions can also be delivered by a respected person from an Aboriginal or Torres Strait Islander community.⁴² Importantly, the Act provides for a court to dismiss a charge against a young person if s/he pleads guilty and the court is satisfied the young person should have been cautioned.⁴³ This provides a statutory check on the exercise of police discretion.

Since 1996, community conferences have been available on police referral as a pre-court diversion option or on court referral after a finding of guilt.⁴⁴ The conferencing program also accepts referrals for adult offenders under an administrative arrangement with the police.⁴⁵ At either point, a referral can only be made if any victim's consent although a conference can proceed without them.⁴⁶

Community conferences are facilitated by conference convenors recruited and trained by the department of Families, Youth and Community Care. Convenors

39 In the first two years of the program, 40 conferences were held. Strang, H, *op.cit*, p10.

40 Strang, H, *op.cit*, p10.

41 Markeiwicz, A, *Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program Phase Two*, Children, Young People and Families Research Unit, University of Melbourne, 1997.

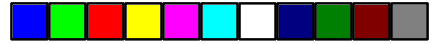
42 *Juvenile Justice Act 1992 (Qld)* ss12-14. Cautions must be given in the presence of an adult of the young person's choice and be explained by the cautioning officer: ss13(2), 15.

43 *Juvenile Justice Act 1992 (Qld)* s18.

44 *Juvenile Justice Act 1992 Pt 1C, Div 2; Pt 5, Div 1A.*

45 Strang, H, *op.cit*, p16.

46 *Juvenile Justice Act 1992 (Qld)* ss18H(1)(b) & 119A(2)(a).



have the discretion not to convene a conference or to discontinue one if they believe the offence is unsuitable for community conferencing.⁴⁷ Conference participants include the young person and support persons, including a lawyer, as requested, the victim or a lawyer acting for him or her and a representative of the referring authority.⁴⁸ One of the features of the pilots has been extensive pre-conference preparation.⁴⁹

Community conferencing has been implemented in four sites throughout Queensland: Ipswich, Logan City, Palm Island and Cairns. The Palm Island pilot has been run by local Indigenous elders from the Island's Community Justice Group.⁵⁰ Evaluations of two of the three pilot sites in 1997-98 concluded that the conferences had been highly successful in regard to the core goal of victim/offender reparation but that referral numbers were very low. They recommended expansion of the scheme.⁵¹

The Fitzgerald Cape York Justice Study Interim Report recently conducted for the Queensland Government surveyed the benefits of diversion programs for Indigenous offenders on Cape York, recommending that community conferencing be made available to all Cape York communities who wish to take advantage of the scheme. It was recommended that community conferencing be worked out as part of the negotiation of a Community Justice Agreement in a particular community.⁵²

Tasmania

In 1995 Tasmanian police introduced a victim/offender conferencing program based loosely on the Wagga model in NSW. In 1998, the *Youth Justice Act 1997* (Tas) came into operation. It establishes a scheme of pre-court diversions by way of informal caution, formal caution and community conferencing. Diversions are only available where the young person admits the offence.

Informal cautions are given where the informant believes 'the matter does not warrant any formal action'.⁵³ For more serious matters, the police officer may give a formal caution against further offending. The victim must be invited to attend this type of caution.⁵⁴

Before a formal caution is given or a referral is made to a community conference, the informant must determine whether the young person consents to diversion, obtain a signed admission and give the young person the opportunity to obtain legal advice.⁵⁵ An authorised officer can request that an Aboriginal elder or

47 *Juvenile Justice Act 1992* (Qld) s18E(4)(b).

48 *Juvenile Justice Act 1992* (Qld) s18D.

49 Strang, H, *op.cit.*, p16.

50 Strang, H, *op.cit.*, p16. At the time of publication of Strang's paper, no conferences had been held on Palm Island since 1998 due to community problems.

51 Hayes, H, Prenzler, T & Wortley, R, *Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot*, Brisbane, School of Administration, Griffith University, 1998.

52 Fitzgerald, T, *Interim Cape York Justice Study - the Situation of Cape York Indigenous Communities*, November 2001, p382.

53 *Youth Justice Act 1997* (Tas) s8.

54 *Youth Justice Act 1997* (Tas) s9(3).

55 *Youth Justice Act 1997* (Tas) s9(1)-(2). A parent or guardian of the young person should be present when the informant is discussing these matters with the young person: s9(5)(a)-(c).



representative administer a formal caution to a young person in the presence of the officer.⁵⁶ An officer can also request that a caution be administered by a community representative from the young person's religious or ethnic group.⁵⁷

Once a young person has consented to diversion to a community conference, s/he must sign an undertaking to attend in the presence of a parent or guardian.⁵⁸ The police officer then requests the Department of Health and Human Services (DHHS) to organise a community conference. Participants at conferences include the facilitator, the young person and family, support people for the young person, the victim and support people, and the informant or another police representative.⁵⁹ If practicable, a conference should determine the outcome by consensus but if that is not possible the agreement of the young person, police officer and victim is sufficient.⁶⁰

A court can order a community conference instead of proceeding to sentence.⁶¹ Once the young person has fulfilled all undertakings given at the conference, the charge is dismissed.⁶²

Formal cautions in practice can operate as victim/offender conferences. However, unlike the 'community conferences' organised by the DHHS, these are coordinated by the police (as they were before the introduction of the Act in 1998). Hence in Tasmania two models of conferencing co-exist.

The Act does not specifically exclude any offences from the pre-court diversion scheme. However, officers are unlikely to consider serious matters suitable for diversion, particularly those that cannot be dealt with by the Youth Justice Division of the Magistrate's Court.⁶³ Jeremy Pritchard, University of Tasmania, is currently conducting an evaluation of conferencing in that State.

Australian Capital Territory

There is no legislation governing juvenile diversion in the Australian Capital Territory (ACT). The *Children's Services Act 1986* (ACT) empowers courts to reprimand a young person found guilty of an offence (without conviction) but contains no reference to police cautioning.⁶⁴

In 1994, a pre-court conferencing pilot was started by the Australian Federal Police. Eligibility for the program was at the discretion of the investigating officer but certain serious offences were excluded, including sexual offences, weapons charges, drug offences and driving under the influence. The pilot is not restricted to juveniles.⁶⁵

56 *Youth Justice Act 1997* (Tas) s11.

57 *Youth Justice Act 1997* (Tas) s12.

58 *Youth Justice Act 1997* (Tas) s9(4), (5)(d).

59 *Youth Justice Act 1997* (Tas) s15. The support people for the young person must be those whom the informant considers appropriate. Facilitators can be employed by or on contract to the Department of Community and Health Services: s167.

60 *Youth Justice Act 1997* (Tas) s17(3), (4).

61 *Youth Justice Act 1997* (Tas) s37.

62 *Youth Justice Act 1997* (Tas) s41.

63 *Youth Justice Act 1997* (Tas) s61(2). Prescribed offences must be heard by the Supreme Court of Tasmania.

64 *Children's Services Act 1986* (ACT), Ss48-49.

65 Strang, H, *op.cit*, p4.



Youth conferences are conducted by trained police facilitators and include the young person, a minimum of four supporters, the victim and supporters and any other relevant people, such as the police informant or an interpreter. Conferences can be held without victims present.⁶⁶ This process is based on the Wagga model of conferencing.

Since 1995, the Centre for Restorative Justice at the Australian National University has been conducting research on the ACT conferencing pilot, called the Reintegrative Shaming Experiments (RISE).

In 2000, a study of the recidivism patterns for those involved in the RISE experiment found a large drop in re-offending by violent offenders diverted to conferencing but little difference in repeat offending by juvenile property offenders or shoplifters.⁶⁷

Northern Territory and Western Australia

For an overview of diversionary options in Western Australia and the Northern Territory please see chapter 5 of this report.

66 Strang, H., *op.cit*, p24.

67 Sherman, L, et al, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)*, ANU, Canberra, 2000, 3: www.aic.nsw.gov/rjustice/rise, 16 August 2001.





Appendix 2



Progress on reconciliation by state, territory and local governments

This appendix provides an overview of progress made by state, territory and local governments in response to relevant recommendations of the Council for Aboriginal Reconciliation. It is intended to complement the evaluation of progress at the federal level in chapter 6 of this report.

1) Formal motion of support for the reconciliation documents by the states and territories

Recommendation 2 of *Australia's challenge*, the Final Report of the Council for Aboriginal Reconciliation, recommended that each parliament pass a motion of support for the documents of reconciliation and to implement the recommendations and principles of the documents through the enactment of appropriate legislation. Commitments to reconciliation for Queensland, South Australia, New South Wales, Western Australia, Victoria, and the Australian Capital Territory are outlined in the Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament.¹

Queensland

- The Queensland Parliament has not passed a formal motion of support for the documents of reconciliation although the government has provided in-principle support for the four national strategies recommended by the Council for Aboriginal Reconciliation in May 2000.

South Australia

- The South Australian Parliament has not passed a formal motion of support for the documents of reconciliation although on 30 May 2000

1 Council for Aboriginal Reconciliation, *Australia's Challenge*, CAR, Canberra 2000, pp115-62.



it formally acknowledged the documents, welcomed ongoing consultation on the development of the reconciliation documents and confirmed its commitment to reconciliation.²

New South Wales

- The State Parliament has passed a motion concerning the documents of reconciliation. The motion as proposed read that:
That this House **supports** the final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth parliament entitled "Reconciliation – Australia's challenge", dated December 2000, and the recommendations in chapter 10.
- Following debate, the word 'support' was replaced with 'note' due to concerns at the controversy of the documents.³

Western Australia

- The Western Australian government has not passed a formal motion of support for the documents of reconciliation. However, like other States and Territories it has stated that it is committed to pursuing reconciliation between Aboriginal and non-Aboriginal Reconciliation. The State government has supported the Council of Australian Government (COAG) priority actions announced at the Council's 3 November 2000 meeting.⁴

Victoria

- The Victorian Parliament is considering options for the adoption of the Council's 'Declaration Towards Reconciliation', including a proposal to introduce a formal motion of support for the Declaration into the Legislative Assembly.

Northern Territory

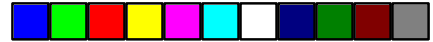
- The previous Northern Territory Government did not consider it appropriate to commit the Northern Territory Government to the implementation of specific policies and strategies developed by CAR.⁵ To date, the new government has not provided its support to the documents.

2 Parliament of South Australia, *Hansard*, Legislative Council, 31 May 2000, <http://www.parliament.sa.gov.au:8080/ISYSquery/IRL45AB.tmp/1/doc>.

3 Parliament of New South Wales, 'Council For Aboriginal Reconciliation Final Report', *Hansard*, 25 October 2001, p17954.

4 CAR, *op.cit*, pp.148-49.

5 Martin, the Hon C, 'Chief Minister's partnership in implementation of Indigenous Education Strategic Plan', Media Release, 1 October 2001.



Australian Capital Territory

- The ACT Government and the ACT Legislative Assembly have formally supported the development of the Council for Aboriginal Reconciliation's documents of reconciliation.

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2) Commitments to sustaining reconciliation by the states and territories

Recommendation 4 of the Council for Aboriginal Reconciliation's final report calls for all sectors of society, including governments, to affirm the declaration on reconciliation and take steps to action the roadmap, as well as provide resources for reconciliation, undertake educational and public awareness activities to improve understanding and relations, and support Reconciliation Australia. Since Corroboree 2000 State and Territory government have made the following commitments to the process of reconciliation.

Northern Territory

Since the recent Northern Territory elections, the new Labor government has demonstrated its commitment to reconciliation in the following ways:

- 1 October 2001 – commitment to adopt partnerships with Indigenous communities and to appoint an Indigenous Co-Chair and representative steering committee to implement the Indigenous Plan 2000-2004; and the creation of an Implementation Group to fast track recommendations of the 1999 Learning Lessons Report undertaken by former Federal Labor Minister, Bob Collins (which had initially been handed to the previous government in 1999);⁶
- Repeal of the Mandatory Sentencing laws;⁷
- Apology to the Stolen Generations;⁸
- Identification of \$37 million to be spent on Indigenous housing (provided by the Indigenous Housing Authority of the NT);⁹
- Inclusion of \$30 million in the National Aboriginal Health Strategy program (funded by ATSIC) for environmental health projects which include housing infrastructure.¹⁰

At the recent Northern Territory elections, three new Aboriginal members were elected to Parliament: Marion Scrymgour, Elliot McAdam and Matthew Bonson. They join John Ah Kit, who was re-elected and made a Minister in the new government.

6 Martin, the Hon C, 'New crime plan repeals mandatory sentencing', Media Release, 18 October 2001.

7 Martin, the Hon C, 'Parliament apologises to the Stolen Generation', Media Release, 25 October 2001.

8 Northern Territory Treasury, *Budget papers 2001-02*, November 2001, <http://www.nt.gov.au/ntt/financial.htm>.

9 *ibid.*

10 Parliament of South Australia, *Hansard*, 30 May 2000, <http://www.parliament.sa.gov.au:8080/ISYSquery/IRLC9B2.tmp/2/doc>.



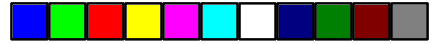
South Australia

- The first State Parliament to apologise formally to the stolen generations;
- Development of a reconciliation statement for schools and children's services by the SA Department of Education, which has led to the development of similar statements by other states;
- Establishment of the Council of Aboriginal Elders in SA, which consists of 21 members, all 60 years of age and over, elected from regional forums across the state, to ensure that support and input is being given by Aboriginal communities at the local level;
- Funding of an Aboriginal justice liaison officer to provide community comment on and input into government responses on law;
- *Vision 21-Aboriginal Policy Perspective-Aboriginal Community Justice* – provides an opportunity for Aboriginal people to have their matters heard whereby government and community Aboriginal justice workers are present to assist Aboriginal defendants. The scheme was piloted and extended to the area of the Port Augusta courts;
- Development of a \$19m Australian Aboriginal Culture Gallery project at the South Australian museum to display the largest single collection of Aboriginal artefacts in their appropriate cultural context, and provides all South Australians and international visitors an opportunity to learn more about Aboriginal people, their culture and traditions.¹¹

New South Wales

- In February 2001, the Premier announced a fresh plan for Aboriginal Affairs – *Partnerships – A New Way of Doing Business with Aboriginal People*. The development of Aboriginal leadership and economic independence will be part of the plan, with the delivery of government services and infrastructure measured against targets and timeframes;
- Aboriginal Community Development Program (ACDP) is a \$200 million housing and infrastructure program. This program, the first of its kind in NSW, is delivering much needed housing and infrastructure to a number of priority Aboriginal communities. 22 communities have been approved for the Early and Major works component of the ACDP;
- Funding for the Aboriginal Business Program was supplemented by \$200,000 to continue support for Aboriginal businesses to market and promote their products and services in new domestic and international markets;
- Aboriginal Participation in Construction Implementation Guidelines released in March 2001 to assist agencies and industry to ensure Aboriginal participation outcomes in the form of employment training and enterprise development are identified, planned and managed in selected government constructions projects;

¹¹ New South Wales Government, *NSW social justice budget statement 2001-02*, 29 May 2001, <http://www.treasury.nsw.gov.au/bp01-02/bpframes.htm>.



- Aboriginal and Torres Strait Islander Workplace Services Unit established in August 1999. The intended outcome of this initiative is better access for Aboriginal people in NSW to information about their employment rights and responsibilities. The recurrent cost of this initiative will be \$150,000 in 2001-02;
- The Department of Juvenile Justice commenced its Aboriginal over-representation strategy for the next three years;
- The Attorney-General's Department receives \$1 million per annum to implement the Indigenous Justice Strategy.

The New South Wales government's list of post-Corroboree 2000 initiatives is further outlined in its Social Justice Budget 2001-2002.¹²

Victoria¹³

- The State government supported a national approach to the issue of the Stolen Generation and welcomed the Federal Opposition's lead in the matter. The Victorian Parliament unanimously passed an historic resolution, moved by the Premier, Steve Bracks, acknowledging a Stolen Generation of Indigenous Australians on April 6, 2000;
- Appointment of the State's first Indigenous Women's Ministerial Advisory Committee;
- State government funding of 'One Stop Shop' to help displaced Aboriginal people trace family ties;
- Funding of state wide forums designed for Indigenous youth to discuss their future role in the wider community and government;
- \$1.75 million Koori Community Fund – allocation of funds made to eight Koori community groups of \$172,375;
- The State government committed an extra \$12 million over next four years to native title and Aboriginal justice (Aboriginal Justice Agreement). \$7.6 million of these monies will provide for the management of native title issues and their resolution. The balance of \$4.4 million has been allocated towards the Aboriginal Justice Agreement;
- 9 May 2001 – Launch of the Aboriginal Family Preservation Program, Wilka Kwe, which will provide intensive support to help overcome parenting and/or family problems. The State government committed \$224,000 to establish the new program.

The government has also demonstrated its commitment to the reconciliation process through its comprehensive response to the *Bringing Them Home* report – supporting a Commemorative Day each May, establishing a family history service, developing a public sector strategy for Indigenous Victorians and supporting the establishment of a Victorian Indigenous Youth Council.

¹² Victorian government, media releases website, <http://www.dpc.vic.gov.au/pressrel>.

¹³ *ibid.*



Queensland

- The key priority for Department of Aboriginal and Torres Strait Islander Policy and Development (DATSIPD) is the development of a Ten Year Partnership (2001-2011) between the Queensland Government and the Aboriginal and Torres Strait Islander peoples;¹⁴
- The Queensland Government's commitment to compensate ATSI peoples for discrimination suffered as a result of non-payment of award wages by the then Government between 1975-1986 has been progressed further. The Government committed up to \$25.4 million over the period 1999 to 2002 that, to date, has allowed the payment of \$7,000 each to over 411 eligible claimants.

The Queensland government also provided funding for the following:

- An Elders Forum to advise Government on issues relating to the Aborigines Welfare Fund. Further research was undertaken on issues arising from the administration of the Aborigines Welfare Fund and Associated Accounts to provide a basis for resolving those issues;
- \$20,000 for Reconciliation Queensland Incorporated to progress Reconciliation at the community level;
- \$60,000 to community organisations under the Reconciliation Community Grants program;¹⁵
- \$1.875 million for the Local Justice Initiatives Program in which Elders and local justice groups use grassroots methods to keep Indigenous community members out of the criminal justice system;
- \$3.2 million for the Diversion from Custody Program, which gives a safe haven to people who are intoxicated in public;
- \$15.3 million for sewerage and housing related infrastructure in the Torres Strait.

Australian Capital Territory (Canberra)

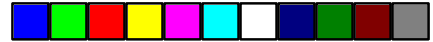
- The government has established an Aboriginal and Torres Strait Islander Unit to provide a specific point of access to these communities and play a strong whole of government role in the development of Indigenous policies;
- Key commitments in the 2001-2002 Budget for Indigenous peoples included funding of \$618,000 over four years, commencing with \$150,000 in 2001-2002, to support the joint management of Namadji National Park. The cooperative management arrangement for the Park is seen by the government as an important good-will gesture to Canberra's Indigenous community.

Other commitments include:

- \$240,000 over four years for an Indigenous Mentoring program a key recommendation of the Federal Government's Indigenous Employment Strategy. The program will offer Indigenous people

14 Queensland Treasury, *2001-01 State budget: Department of Aboriginal and Torres Strait Islander Policy and Development*, June 2001, <http://www.treasury.qld.gov.au/bud.htm>

15 *ibid.*



mentoring support in their workplace, building on a pilot study conducted in 2001-2002;

- \$150,000 over two years to support the recently established Indigenous Business Chamber. The Business Chamber is another key recommendation of the Indigenous Employment Strategy;
- \$415,000 over four years to enhance the Gugan Gulwan Indigenous Youth Centre;
- \$1.036 million over four years, with \$250,000 in the first year, to enhance health services for Aboriginal and Torres Strait Islander people;
- \$351,000 for an early intervention initiative for protection of children.
- An allocation of \$770,000 to be provided over four years, with \$186,000 in the first year for Indigenous mental health workers;
- \$1.575 million over four years with \$384,000 in the first year, to meet the specialised needs of Indigenous, Vietnamese and women in corrections system.¹⁶

Western Australia

- The State government drafted, managed and led the national policy on Reconciliation as endorsed by the Council of Australian Governments (COAG) through work for the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA);
- A State, Commonwealth and ATSIC Agreement was also negotiated and co-ordinated for the Provision of Essential Services to Indigenous Communities in Western Australia;
- The State government negotiated and co-ordinated the first ever joint communiqué between the State and ATSIC on priority issues such as land, town reserves and family violence and set up a framework for co-operation;¹⁷
- A 'new' relationship is emerging between public sector agencies and Indigenous Western Australians, through the linkage of the Indigenous Affairs Coordinating Committee (IAAC) to the Cabinet Standing Committee on Social Policy;
- "Our Future Together", a joint initiative with the Department of Education, has been designed and developed to promote reconciliation in schools;
- Guidelines were established for expediting a return to country of cultural artefacts and skeletal material in a sensible and appropriate way, exploring the use of sites and keeping places. Heritage and culture partnerships developed with WA Regional Museums and relevant community Elders and other members;
- Funding of \$145,000 for Aboriginal Community patrols has been allocated through election commitments.

16 Moore, the Hon M, 'Improving quality of life for Canberra's Indigenous people', media release, 1 May 2001, <http://www.act.gov.au/government/budget/budget2001/mediareleases/>.

17 Department of Treasury and Finance, Western Australia, 'Part 12 - Indigenous Affairs', *Budget papers 2001-02*, 13 September 2001, pp1147-65. <http://budget.treasury.wa.gov.au/>.



3) Progress on reconciliation by Local Government

The Australian Local Government Association (ALGA) is the national representative body for Australia's 698 local authorities. It is constituted as a federation of local government associations in the six States, the Northern Territory and the Australian Capital Territory. ALGA made the following commitments to reconciliation and native title in its National Agenda for Australian Local Government of October 2001.

- Endorsement and support for the Council for Aboriginal Reconciliation vision of 'a united Australia which respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all';
- Support for recognition of Aboriginal and Torres Strait Islander cultures in the Australian Constitution;
- Recognition of the Aboriginal flag and Torres Strait Islander flag as representing the Indigenous peoples of Australia;
- Recognition that the Aboriginal peoples and Torres Strait Islanders are the original occupants of Australia. Councils will acknowledge this at civic events by a statement such as:

In the spirit of reconciliation we acknowledge that we are meeting on the country for which (name of local people) and their forebears have been custodians for many centuries and on which Indigenous Australians have performed age old ceremonies.

- Commitments for local government to achieve the following by the year 2010:
 - The implementation of the National Strategies to Address Aboriginal and Torres Strait Islanders Disadvantage and the National Strategy to Sustain the Reconciliation Process as outlined in the document of Reconciliation;
 - A review of tourism literature to ensure the inclusion of local Aboriginal and Torres Strait Islander history;
 - A review of all public library collections with a view to ensuring that Aboriginal and Torres Strait Islander issues are portrayed in a culturally appropriate and accurate manner.
- Recognition and expression of 'deep and sincere regret at the hurt and distress caused by policies which forcibly removed Aboriginal children from their families and homes. It recognises that a great injustice was inflicted on Aboriginal peoples in the name of assimilation and integration and reaffirms its support for reconciliation between all Australians. The removal of Indigenous children from their families has had far reaching consequences, depriving many of contact with their people, country, language and culture. Local Government commits to making all necessary records and assistance available to aid the victims of these policies in their grief and rebuilding of their family histories and place in today's Australia.'¹⁸

18 Australian Local Government Association, *National agenda for Local Government*, ALGA, Canberra, 1999, p44.



- Local Government recognises that where developments impact on the fabric of the local Indigenous cultural heritage, Councils must exercise leadership in ensuring that local Aboriginal and Torres Strait Islanders' needs, aspirations and cultural and spiritual values are taken into account in planning processes.
- Local Government accepts a responsibility to ensure that the traditional owners of land are consulted and actively involved in environmental planning and management processes.
- Local Government recognises the validity of native title. It urges the whole community to seek a consensual response to native title rather than promoting litigation and legislative intervention.
- Local Government calls on Australian Governments to ensure a swift and fair process and satisfactory remedy to native title claims, and for financial support to Councils to assist full community participation in that process.
- Local Government will promote the negotiation and effective implementation of local and regional agreements on native title and other issues affecting relationships between indigenous and non-Indigenous Australians.¹⁹

The following Councils have made national statements of commitment, and in some cases, apologies:

• ***NSW Councils***

Auburn Council
 Cootamundra Shire Council
 Goulburn City Council
 Kempsey Municipal Council
 Kogarah Municipal Council
 Auburn Council
 Cootamundra Shire Council
 Goulburn City Council
 Kempsey Shire Council
 Kogarah Municipal Council
 Leichhardt Municipal Council
 Maitland City Council
 Newcastle City Council
 Parkes Shire Council
 Penrith Council
 Port Stephens Council
 Randwick City Council
 Shellharbour City Council
 Singleton Shire Council
 Warringah Council
 Wollongong City Council
 Woollahra Municipal Council

¹⁹ *ibid.*



▪ ***QLD Councils***

Ipswich City Council
Maribyrnong Council

▪ ***VIC Councils***

Darebin City Council
Greater Dandenong City Council
Melbourne City Council
Moonee Valley City Council
Moreland City Council
Banyule Council
Manningham Council
Nillumbik Council
Yarra City Council
Yarra Ranges Shire Council

▪ ***SA Council***

Whyalla City Council

▪ ***WA Councils***

Vincent Town
Shire of East Pilbara

▪ ***TAS Council***

Glenorchy Council²⁰

20 Australian Local Government Association, 'Reconciliation in the community: Service agreements', <http://www.alga.com.au/reconciliation>.